

6^d H. Hargrave
A B La
GUIDE
TO
ENGLISH JURIES:

Setting forth their
Antiquity, Power, and Duty,
From the
Common-Law, and Statutes.
With a TABLE.

By a Person of Quality.

ALSO
A LETTER to the Au-
thor, upon the same
SUBJECT.

London, Printed for Thomas Cockerill, at
the Three Leggs over against the
Stocks-Market. 1682.



To all Honest
JURY-MEN.

Gentlemen,

IN a Word, You are England's Ephori,
and Tribuni; The Boundaries of
Prerogative and Priviledge, and the
living Bulwark of the Laws. Your Ho-
nour is Eclipsed, is un- * Learned Dr. Cowel,
accountably * Shrunk: in word Jury, speaks
The Office yet is Great: of Juries being (in
Here's Demonstrated the his own words) Affe-
Great Priviledge you be, ciates and Assistants to
that it may be seen how the Judges of the Court
much all English-men (anciently) in a kind
ought, in Interest, to Va- of Equality; whereas,
lue and Encourage you. now adays, (says he)
Here's set forth What they attend them in
and How you may Do, great Humility, &c.
and What and How you Citing also Lamb. and
may not Do, under what Penalties: Also
Cust. of Normandy. a-
greeing with him.

the History of the Whole. The King is graciously pleased to Declare, He will Govern by Law; It's fit you should know how to Govern your selves according to Law. This is Concise, and a Breviat, rather than a Book, that, should it meet with a queasie Stomach, little Purse, or narrow Soul, the same might not stumble at it. If any thing by this means happen so general, as admit of any Exception, you may expect it in some other, if not in the same place. It's chiefly about Criminal Causes, where the King's Name's used for that of the Plaintiff, because, most Difficult and of Greatest Concern; But is serviceable and sufficient for others too. It may, at least, serve to Stir up, and to Foil, if not Assist learned Hands. Adieu.

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nesses, 111, &c. Judges determine who
shall be Sworn, 114, must be two,
104, &c.

A Guide

A
GUIDE
TO
English Juries, &c.

OF what Date Juries be, is the same to say, as when was *England* first Inhabited, altogether uncertain. But that their Antiquity herein *England* runs to and beyond the *Norman* Conquest, among the *Danes*, the *Saxons*, and the *Britains* is most certain. *Olaus Magnus*, *Olaus Wormius*, *Versteeganus*, *Fortesc. Co. Lit.*, &c.

The *Saxons* Conquering the *Britains*, mixed their Customs with

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the

the *Brittish*, so the *Danes* those *Brittish* and *Saxon* ones with theirs, and the *Normans* all these with theirs; every Conquerour making some alteration. Yet this Law was, and from time to time hath been preserved and continued an Inheritance indisputable and Sacred unto us through all Revolutions, without any Interruption.

None but must acknowledge this of all others the best and most effectual way to find out Truth. There is no other way or Art in the whole World, says *Fortescue*, so remote from all danger of Subornation and Corruption, 75.

Aaron had, it's true, in plain Letters of Gold, *Urim* and *Thummim* wrote on his Breast, signifying what he either had, or ought have had, *lucem in monte, ac in voluntate rectitudinem*, Ability in Parts, and Integrity in Practice.

But

English Juries. 3

But have always all other Judges since had such Parts and Practises? Their Interests, Ambition, Pleasures, other Passions and Frailties influenced them too much, rather sufficient enough to render them, as the Prophet *Isaiah*, c. 33. v. 15. says, *Idols with Eyes, Ears, and Mouths, viz. Such as would neither hear the Peoples Complaints, regard the Oppressed, nor pronounce a just Judgment.* Judges have Places and Preferments so extraordinary Honourable and Profitable. And what's their Tenure? Even during pleasure, a term for so long as they do nothing but what and as pleases, &c. and do every thing which and as does please, &c. And whose pleasure must it be? Truly every ones too, that any how has or can make any interest, &c. Thus a short Syllogisin proclaims them little other than Bond-slaves to such mens pleasures,

B 2

fures, and menaces the People with the worst of all Miseries, Law-oppression, Oppression under colour of Law; unless it be conceivable Mens pleasures were to have the Judges give Sentence against them. Judges also were all Lawyers we know, used just before to take Fees, it's the more therefore all forget it now. Judges are concerned in so many Causes, they are subject to be tempted the oftner, and every temptation is the greater, because they know, if would yield, their gain might be so often. Judges are so few, it's plain they may the easier be Corrupted. Judges can't want Courage, they think themselves lyable to no Action, &c. in any case, do what they will, but are absolutely dispunishable, *Co. 12. 24, 25. Hutton.* Whereas a Jury, on the other side, if it err, in many cases it's lyable to an Attaint, the

English *Juries*.

5

the greatest Punishment they know on this side Death. A Jury consists of many Persons. Those which be Jury-men in one Case, yet may be in few more. They be Men of other Professions, used never in any Case to take Fees, &c. They are not prejudiced with fear of losing their Offices, &c.

And to further manifest the difference of Tryal by Judges, and of this by Juries, Jury-men all are, and must be *Liberi & legales homines*. *Liberi* free of, and from all manner of Bondage, Obligations, Affections, Relations, Passions, Interests, and other Prejudices whatsoever (as indeed it's ill Fishing in muddy or troubled Waters.) *Legales*, ones Peers or Equals. *Mag. Ch. c. 29. West. 1. c. 6.* Of full 21 years old, not Out-lawed, never Attainted or Convicted of Treason, Felony, False-Verdict, Perjury, any

Conspiracy at Kings-Suit, nor ever
 Adjudged to the Pillory, Tumbrel,
 &c. whereby rendred Infamous ;
 nor any Alien (unless an Alien be
 Tryed, &c.) But such others as be
 most nigh, most sufficient, and least
 suspicious, 28 *E. 1. c. 9. F. N. B.* 165.
Dy. 59. 34 *E. 3. c. 4. Regist.* 177.
 8 *E. 3.* 30. They were Anciently all
 Knights, *Glanvil. l. 2. c. 14, 15. Bract.*
 116. They are, and must be yet
 Persons of Honour and Repute.
 1 *R. 3. c. 4. Brit.* 39. *Mir.* 117,
 118. 11 *H. 7.* 41. *Young* 116. 11 *H.* 4.
 35. *Stanf.* 88. And *Si l' Endite-*
ment ne y ert een fait de croyable
gents & de bone fame, n'est nul tenu
a cette respondrue. If an Indictment
 be found, but not by Credible Peo-
 ple, and those of good Repute, no
 body's bound to take notice of it,
Mir. 200. They must be such Per-
 sons as are named and returned at
 Election of the Sheriff or Coroner.
 They

English Juries. 7

They must be every one Sworn every severall Tryal, and that in and by a particular Oath: If any of the Grand Jury be as aforesaid, anywise amiss, what they do is quashed and made void on bare motion to the Court. If any of the Petty-Jury happen so, the party by Challenging of them, as appear to be Sworn, either sets aside the *Pannel*, viz. all of them, or may any of them, by taking exception to the Poll, viz. to them severally, as the Case falls out; and peremptorily, without shewing any Cause, may Challenge and set aside as many as will, under 36. in case of High Treason, or Misprision of High-Treason; or under 21. in case of any Felony. And shewing any such Cause as aforesaid, as many as will, in any Case whatsoever, *Co. L. 156.* Now they are such Elect and choice Men, because of the great Trust reposed

in them : And must be Equals, that the Defendant may the better speak to, and expostulate with, or reflect upon them, if do amiss. And that they may not be over-awed, &c. by's being greater than them; (whereas *Magna stupent, superiora perstringunt*. Greater things confound and astonish us, and things above us dazel our Eyes.) Nor be careless or perfunctory for his being much less than them, (*Inferiora ut exigua & minima contemnimus*. We are apt to slight things beneath us, as small and contemptible, or inconsiderable.) And must be of the Neighbourhood, that coming from nigh where the Question arises, the Defendant, in all probability, may have the better knowledg of them to except against, or to approve of them; and such may also the more likely know somewhat themselves of the Party, of the Matter, of the Credit.

English Juries. 9

Credit of the Witnesses, and all Circumstances. *Lex intendit vicinus vicini facta sciat. Co. L. 78.* Thus if the place happen disputable, whence the Jury shall come, they shall come from whence the matter is like best to be known. 21 E. 4. 8. Besides, in this way of or by Jury, where Life or Member is concerned, or in any danger, and in all other Criminal Causes is required two Tryals of the Party before he can be said Guilty, or any Judgment can be given against him; And the Party must also be found to be Guilty on both these Tryals, else all is nothing. The Grand Jury must first Examine the matter, and the Petty-Jury after Examine all again to prevent and secure against all surprizes of the Party, and Mistakes or Errors in the Jury. It seems as if very Anciently the number on a Jury was indefinite, but it was all the Persons present,

B 5: come

come as would come, *Britt. N. Bacon, &c.* Like as of Old it was here of those we now call the House of Commons : *Concil. Brit. 350. Ingulph. &c.* And in the Tryals at *Rome*, where *Vox Populi* was the Verdict, (except in Case of a Senator, which indeed was Tryed by his Peers, other Senators.) Hence probably it was that all Courts were at first to be open, and so accessible. Likewise *Deut. 19.* and some other Texts of the Old Testament, seems as if the Tryal amongst the *Jews* were so. But in Analogy of late it's reduced to the number of twelve, like as the Prophets were twelve, to foretell the Truth ; the Apostles twelve, to Preach the Truth ; the Discoverers twelve, sent into *Canaan* to seek and report the Truth ; and the Stones twelve, that the Heavenly *Hierusalem* is Built on : And as the Judges were twelve anciently to Try and Determine matters of Law, and

English Juries. 11

and always when there is any wa-
ging Law, there must be twelve to
Swear in it; and also as for matters
of State, there were formerly 12
Councillors of State. And any
thing now which any Jury can be
said to do, must have the joynt con-
sent of twelve, *West. 2. c. 13*: Else
it's in construction of Law, not the
doing of the Jury, but of Private
Persons, and void. *Mir. 42. 200.*
41. Aff. 11. 6 H. 4. 2. 21 E. 3. 31.
29 E. 3. 43. Finch. 58. The Grand
Jury consists of more Persons com-
monly than twelve, but as aforesaid
twelve agreeing, it's enough, and
so many of them must. So that by
the Law of Juries 24 Men in all, first
and last, find one Guilty, &c. be-
fore the Judgment can be given, or
one can be punished for the Fault
one's accused of. And besides every
Man of the later Jury, even all the
whole twelve must all and every of
them

them agree, and be of that one and only Mind; (much to suspect, unless one be certainly and plainly Guilty. It's more for all twelve, than for twenty nine out of thirty to agree.) Any of the Grand Jury giving in a Presentment, or Indictment without eleven more of the same Mind, and agreeing with him, ought to be Imprisoned, 40 *Aff.* 10. which also for any one of the Petty-Jury to do, none will deny but to be worse. A Judge was Hanged for giving Judgment on the Verdict of eleven Jury-men. *Mir.* 296. But on the other side, the Judges are not so many at a Tryal scarce ever, the major part of them agreeing, it's enough; their Tryal would be but one, or once only; they are never Sworn at the Tryal, nor ever at all, but only once, and that exceeding generally; they cannot any of them be excepted against,

against, or Challenged (though Anciently might. *Lamb. Mir. Bract. Fleta*) be they never so great strangers, professed Enemies, and otherwise ill qualified; And though the King be party, yet chooses them himself against one.

Besides, if Judges had Power of both determining the matter of Fact, and also the matter of Law, as must, if were no Juries, their Latitude of Erring, &c. must then be the greater, and their doing wrong or mischief might be the more, in as much as might wrong one then in both the Fact and Law; and their Encouragement so to do, would be Improved, since then it must be harder to detect them, as whether erred in the Fact, or in the Law, or partly in both; like as it's easier seeking a Bush than a Wood. And as it's said, *Occasio facit furem*. Opportunity makes many a Whore.

But

But were Judges presumed Saints, and never so upright, &c. yet who can imagine but at a Tryal, when Witnesses are all Examined, and Evidence all given, the Jury being so many Persons, and probably knowing something of the matter before, they may all assisting one another better observe, remember, and judge upon the whole matter, than any one or two, &c. others, though called Judges? Certainly one may do more with help than without. So the Proverb is, *Ne Hercules quidem contra duos; oculi plus oculo vident.* Two to one is odds at Foot-Ball: And *Non omnes sed pauci decipi aut decipere possunt.* The fewer may the more easily deceive, or be deceived. *Quandoque bonus dormitat Homerus.* *Nemo sine crimine vivit.* Humanum est errare. It's natural for Man to err. None's without fault, and the surest foot may slip.

Vise.

English *Juries.* 15

Visc. St. *Albans*, *Aph.* 8. says
That's the best Law which leaves
the least to the Arbitrariness of a
Judge ; and *Bract.* 119. says, Judges
represent the Kings Person, they are
his Officers, and Act in his stead;
(and hence concludes) they ought
not at all be concerned in Causes of
Life or Member, &c. (where the
King's Party) for, says he, the King
is thus Judge as it were in his own
Cause.

Thus appears what is the difference of Judges and Juries, and something of the Reason why the Parliament has all along been so Zealous for Tryals by Juries, as no fewer than 58 several times since the *Norman* Conquest, hath established and confirmed the Tryal by Juries ; no one Priviledge else nigh so often remembred in Parliament.

Now, for the Power and Authority

rity of *Juries*, and how the Wisdom of the Law hath entrusted and enabled them in this Tryal. The Law says, in Tryals, whether any Complaint as made, or any matter as alledged be true or not, the Judges ought not, nor can say, nor have any thing at all to do therewith, but the Jury only. *Ad questionem facti non respondent Iudices.* All the whole, or most they can do, or at least ought, is only after and upon what the Jury, or the Parties themselves agree first to be true. What the Jury does, is called *Verdictum*, *Veridictum*, the declaring of what is the Truth in the matter. What the Judges do, is called *Judicium*, *Juris dictum*, the telling only of what is the Law. Thus it is that every finding of the Jury as their Verdict, &c. must be positive what the Fact and Party's intent &c. was, and not saying only what their Evidence

dence is, that it was; for the Judges can't even so far meddle with, or take Conusance of the matter of Fact, as but to say, then the Fact, Case, &c. is so and so; if you agree your Evidence to be so and so, and accordingly give Judgment. *Co. 9. Downham's c. Co. 10. Oxford c. Bentow 3 E. 6. Isaac & Clerks c. Hob. 167.* As *A.* delivers *B.* Goods, and after demands them again of *B.* but he refuses to deliver them again; If *A.* sues *B.* for finding these Goods, and converting them to his own Use; the Judges will tell the Jury, since *B.* refuses to re-deliver them, this is Evidence enough to find him Guilty of converting them to his own Use, &c. and is in Law a Conversion. But if the Jury give their Verdict, &c. specially as that *A.* delivered *B.* the Goods, and after redemanded them, but *B.* refused the delivering of them back
 (without

(without saying positively *B.* converted them to his own Use, or not saying generally, we find for the Plaintiff, which is *tantamount* the Judges can't say and Judge *B.* Guilty, &c. but must discharge him. So where in a Tryal, fraud is pretended by one Party done, &c. by the other, the Judges will tell the Jury, such and such parts of the Evidence prove the fraud, or in construction of Law are fraud. But if the Jury give their Verdict specially, that such and such things are true (which the Judges said prove the fraud) and not saying positively there was fraud, the Judges can't say or Judge fraud, nor take the least notice of any thing as such. In the Case of *Roger Mortimer* in Parliament, *A6. 1 E. 3.* it was adjudged there, *28 E. 3. n. 10.* that the matters he was accused of, though were notorious, and known to them all in Parliament,

ment, and all People else, yet they could not give Judgment upon this, nor any time ought proceed on any knowledge of their own. One Condemned of Trespass in the Common-Pleas, the Judges seeing him in Court, and knowing him never so well, yet it was adjudged, if he deny himself to be the same Person, they can't say he is, and so cause him apprehended; because they can't Judge of any thing, nor take notice but only of what is upon Record before them, 33 *H. 6. 55.* Thus if *A.* be Indicted of stealing five shillings, the

Jury may give a Verdict, that he is Guilty of stealing the five shillings, but only to the value of ten pence; and the

ancient shilling, and save many, not Guilty of above the value of 40 *s.* present Money.

In *Henry* the Third's time 1 *s.* was as much as 40 now, and before then, more; yet the Law was then, one must steal above the value of 1 *s.* to be Guilty of Felony, So that Merciful Juries now value by the An-

Judges

Judges here can't say the five shillings were more worth or less, though never so apparent. King *Henry* the fourth asking Judge *Gascoyn*, what if he saw *A.* kill *B.* and the Jury will find not that *A.* killed *B.* but that *C.* did? He answered, I can only Reprieve *C.* and then intercede with your Majesty for his Pardon. *Pl.* 83. The Infamous *Empson* and *Dudley*, proceeding to Judge as Judges, of matters upon Information by Witnesses, &c. otherwise than by Juries; this was one indeleble blot in their Escutcheon, though had an Act of Parliament (11 *H.* 7. c. 3.) to warrant them in so doing. *Ander. l.* 1. 156. When a Prisoner is Arraigned; he says, he puts himself on God and his Country (neither of which are the Judges) for his Tryal; which Country is the Jury. So it is manifest, Juries have the sole Power and Consuance of the matters.

ters of Fact, as whether a thing be true or not, &c. and the Judges have at most only to do with matters of Law.

Jury-men have also the determination of Law, but with this difference from that of Fact, that it's necessary they determine the matter of Fact. But they may either refuse to meddle with any thing of Law, and leave it to the Judges, or at their Election may take upon them knowledge of the Law, and determine both Fact and Law themselves. *Lit. §. 368.* and so is every daies Experience, whereof see more anon, speaking of general Verdicts, and special Verdicts. Only if a Jury give a Verdict, setting forth specially or particularly how the matter was, and then draw an ill Conclusion as to the matter of Law thereupon, the Judges will Judge against, and so make the
Judg.

Judgment of the Jury in the matter of Law void. *Hob. 53.* As suppose *A.* be Indicted of Murdering *B.* the 10th. of *Feb.* &c. And the Jury give their Verdict, that *A.* gave the Wound at *C.* the 5th. of *Feb.* and that *B.* died at *D.* the 10th. of *Feb.* And conclude that *A.* Murdered *B.* at *C.* or on the 5th. of *Feb.* Now the Law saying the Murder was on and at the place and time when and where the Party died, the Judges will Judge against the Judgment of the Jury. *Co. 4. 42.* So *Anno 1654.* in *B. R.* between the Protector and *Somner*, the Court said, the Jury had concluded contrary to their premisses, finding he killed two Men on the Road, but calling it Manslaughter, *se defendendo*: And so the Judges Ordered him to be Tried again.

Thus we see, Judges are unessential and needless in a Tryal by Jury,
further

further than to assist it by answering and informing what the Law is where difficulties arise, or at least the Primitive constitution might be thus. Like as also yet they be in the House of Lords, or when any Tryal is by the Lords but Assistants only, when consulted; and no Parties of or at the Tryal, &c. Or as it is, and always has been in Courts Barons, Hundred Courts, Courts of Ancient Demesne and County Courts. 6 E. 4, 3. *Crompt.* 232, 233. and where the Sheriff is made Judge, though by the Kings Writ, &c. *Co.* 6. 11, 12. The very form of special Verdicts to this day, looks as if it were so. As in Murder, the Jury find and give their Verdict (first) how, and in what manner particularly the Fact was committed, and then say, But whether upon the whole matter aforesaid, the killing aforesaid of J. S. be Murder (in
con-

construction of Law) the Jury is ignorant, and therefore ask the Advice of the Court; and (further saying) if upon the whole matter aforelaid it seem to the Judges and Court, that it is Murder, then *the Jury* on their Oath, say, *the said J. N. is Guilty* in manner and form as by the Indictment against him is supposed. And if upon the whole matter, &c. it seem, &c. that it is not Murder, then, &c. *J. N. is not Guilty* in manner, &c. Co. 9. 64. So all the Judges do, is but Advice, though in matter of Law; and it's the Jury only that Judges one Guilty or not Guilty of Murder, &c. and whether it be Murder, or what one is Guilty of, by the Advice and Assistance only of the Judges, without their being any wise any Parties of or in giving such Judgment. And the Reason, and only Reason why it ever seems otherwise, may rise hence,

hence, that the Judges of *Westminster-Hall* keep the said inferior Courts to their due Bounds, Methods, and Order. And the Lords keep the Judges to theirs, when amongst them; but there's no body does in *Westminster-Hall*. The like is hinted by the *Stat. of Marl. c. 26.* which says, *Murdrum, &c. non adjudicetur coram Justiciariis.* Murder, &c. shall not be adjudged in the presence of the Judges: Shewing the Judgment always to be in the presence of, and not by the Judges. The Ancient Books call Jury-men Judges, as *Mir. 209.* And it's not for nothing, the Law is so tender of them. He that strikes one of them, it's perpetual Imprisonment; and forfeiture of the offending Hand. *Judg. 174.*

It, perhaps, may be pardonable in Councillors, because for their
C Fees,

Fees, and not pretending Authority : But why Judges, though apt to Indulge, Improve, and Extend their own Power and Jurisdiction, should offer to brow-beat, threaten, order, impose upon, or wheadle, flatter, tempt, insinuate with, or any wise lead, perswade, direct, incline or dispose Juries how to find their Verdict, unless only directing them so far as Juries require of them ? it's hard to say. People daily Rob, and so have done on *Salisbury-Plain*, but it's ne'r the more Lawfull. Thus are Judges Trumpets, and Juries the Echo, let who will blow. Thus are Juries but an empty name : Thus is turned topsy-turvy all the whole thing of Juries. Thus might the Judges draw, and ingross to themselves the whole Power in the Tryal, and be in effect Judges and Juries too. Thus is the Tryal by
Juries

Juries a colour, a sham, and really no Tryal at all by Jury. Were this allowable by Law, we should never have had any; the having them would thus be only an unnecessary trouble, &c, whereas *Lex nunquam per plura quod possit per pauciora.* The Law never sets up or requires any thing so vain or fruitless.

But some will say, the Jury can do nothing but on the Evidence given in Court, which the Judges hear as well as the Jury, and so may see the Truth, and know how the Verdict ought to be as well as the Jury, and consequently they may Instruct, Assist, &c. the Jury. It's true, they may be helpful, they may assist, but however, it's no matter for their being as aforesaid, too Officious. And besides, as aforesaid, that the Jury is Neighbours of the Fact, of the Party,

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of

of the Witnesses, &c. but the Judges strangers; and the Jury be more Persons, and the Judges fewer, &c. The Jury also is not bound up to the Evidence only given in Court, or that the Judges hear, but may go upon their own private knowledge. Suppose *A.* sues *B.* on a Bond for ten pounds, and *B.* pleads payment; but at Tryal proves nothing: The Judges themselves say to the Jury, you must find for *A.* unless know the Money paid your selves: Which shews the Jury may find for *B.* if they know the Money paid, though the Judges knew nothing of it, 4 *H.* 7. 29. So *Hob.* So if one be Arraigned, and no Witness produced against him, the Court says the like; as was seen this *Michaelmas* Term, 81. in *B.R.* *Bradley's* Case, and by daily practice. They use their own knowledge besides, and often against the Evidence

Evidence in Court, *Cr. El.* 616. *Groves* and *Shorts* Case: So in *Plowd.* 410, 411. So a great Case adjudged in *B. R. Hill.* 21 C. 1. And another there, 22 C. 1. And so says *Stanf.* If a Jury know any thing of themselves, it's as much as by Evidence, 130. So *Plowden* says, a Petty Jury is sometimes bound to give their Verdict, though have no Evidence, *f.* 12. Hence in all Cases at Common Law, one Witness is accepted of as sufficient; and doubtless any Verdict is good, though in such Cases, without any Evidence given in Court, because the Jury is presumed to know somewhat of themselves. Whereas in all other Countries in the World, where Juries be not used, and here when the Tryal is without a Jury, there must be at least two, as hereafter shall be said more at large. Thus in any Attaint

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brought

brought against a Jury, more Evidence may be given on that side the Jury passed of or for, or in behalf of the Jury, than was given before, *Dy.* 53.^b which could not be, if their own knowledge were not Evidence as well as that given in Court. *Styles* says, 23 *C.* 1. in *B. R.* it was adjudged, that the Grand Jury are not bound to find an Indictment, though have Evidence, since they may know something of themselves to over-balance it. So is *Plowden*, A Jury may sometimes go against their Evidence given in Court, 8.^b And one may read, Juries were Anciently punished for going though according to the Witnesses, if happened false ones, *Mir.* 48. The Evidence to a Grand Jury is seldom heard by the Judges, which yet could not be, if none were Evidence but what given in Court.
Like-

Likewise a Jury knowing of a Record, Statute, &c. may give their Verdict, &c. according to *it*, though never given in Evidence. *Moor* says, a Jury-man delivered his Companions a certain Paper concerning the Question out of Court, yet the Verdict was adjudged good, *Case 656*. Besides, if it happen they have no other Evidence but what the Judges know as well as they, yet they ought by, and according to the true purport and meaning of their Oaths, to proceed on it in their own sense, and as they apprehend or understand it themselves, and no otherwise, though the Judges differ with them; else how can they discharge their Conscience? And it often falls out, they may differ. No two Lawyers, nay, Judges reading or hearing the very same Case, but presently make different Inferences,

Deductions, Collections, Conclusions, and Arguments, yea, the same Person at different times; like as the Philosophers hold our Senses and Sentiments as different as Physiognomies. And why should *A*. impose his Opinion on *B* rather than *B*. on *A*? So of Judges and Juries. One can't see by another's Eyes. And this is certain, every thing any Jury does, as a Jury, is on Oath, and they swear to be true by virtue of the Oath at first administered them; therefore if any of them happen to joyn in a Verdict, &c. with the rest against *his* Opinion, or not thoroughly satisfied in their *own* private judgment, such a Verdict, &c. though never so true and good in it self, yet makes the Party or Parties, as aforesaid, not satisfied, certainly forsworn, at least *in foro Conscientiæ*, as to their Conscience. For Perjury is not
only

only a lye confirmed by Oath, but likewise either when any one being deceived, and believing that to be true which is not, rashly, or unadvisedly swears it to be true. Or either when any one thinking a thing not true, swears it is true, though indeed it be true, *Flet.* 334. *Bract.* 288, 289, 292. and all the Casuists. So is seen in *Palmer's Reports*. One was Indicted and Punished for swearing a thing so and so, because he did not know it to be true as he swore, though the thing was really and truly as he swore. So that upon the whole, one may see a Judge ought not to meddle at all with the Jury: If he differ not with them, it's needless and troublesome; if he differ, they are not to mind him; take it which way one will.

But perhaps it will be urged, that this must be understood only as to trying matter of Fact, and that however, as to matter of Law, the Jury ought always to be advised and governed by the Judges, though not as to matter of Fact. No, no further than a mannerly deference that is payable to the Judges, as more Learned in the Laws. For if the Judges say, or any Witness swear the Law to be so and so, no Jury is by Law bound, or any wise obliged beyond their own Reason, &c. at least to believe them in it, 9 H. 6. 38. *Finch* 58. If an Attaint be brought against a Jury, it's no Excuse, that the Verdict is according to the Judges Directions,

Cro. El. 309. 18.

Contrary to the intent.

Now, says a timorous ignorant Juror, Oh! but whether the Law be thus or not, the Judges will Punish

Punish the Jury if comply not with them. This sure would be pretty! A Jury, perhaps, forsworn, and lyable to an Attaint, if do comply, and yet punishable if do not: No, no, the Law (which is nothing but improved and refined Reason) was never so unreasonable to suffer this. *A.* levied a Fine of Lands to *B.* and *B.* paid *A.* the purchase-money. But after *A.* said, he was then at levying the Fine under Age of One and Twenty years old, and therefore the Fine was void. The Law sayshere, the Judges shall determine by looking on the Party, whether he were of full Age or not, and the Jury shall not (the true Reason being, that if the Party seem of full Age, though he be not, he shall not avoid the Fine, to prevent cheating, &c. Whereas if the Jury were to try it, they must not go according to the
seem-

seeming but real true Age, and so if he want but a day of One and Twenty years, he must thus be adjudged under Age as much as if he wanted Twenty years, and B. should be cheated.) This Fine was after reversed by Kings Bench, because A. did appear, and was also proved by Four Witnesses to be under Age. But the Validity of the Fine coming after to be disputed in Common-Pleas on a Tryal by Jury, though the Court here told the Jury, that notwithstanding some Witnesses prove to you A. was of full Age at levying the Fine, yet you ought not to heed them, for the Judges have the sole and only power of determining whether of full Age or not, and the Judges of the Kings Bench have already determined it; nevertheless the Jury being somewhat extraordinary, and not so very leadable Men, gave their Verdict
con-

contrary to the Direction of the Court, and as if *A.* were then of full Age. And an Attaint being after brought against the *Jury*, the *Jury* was acquitted and commended; *Dy. 201. & 301.* And the *Jury* is the more justifiable in it, since the Judges first altered the Law, in trying by Witnesses, and not only by Inspection, as *Juries* also do, which in Tryals by Witnesses are, as aforesaid, the more competent, &c. Of this Nature is a memorable Case of *Busbel*, reported by Lord Chief Justice *Vaughan*, where *Meade* and *Penne*, two Quakers, were Indicted at the *Old Baily* for their Meetings; and the *Jury*, whereof *Busbel* was the Fore-man, would not find them Guilty: The Court, mighty angry, Fined and committed the *Jury*, alledging for cause, That they (the *Jurors*) against the Law of the

the Realm, against full and manifest Evidence, and against the Direction of the Court, in matter of Law, to them in Court openly given and declared, had acquitted the said *Meade* and *Penne*. But upon long and serious Debate, it was after adjudged, the Commitment, Fining, &c. was unlawfull, and accordingly the *Jury* were discharged, &c. Another time also a *Jury-man* dissenting with all the rest, and that no less than two days; the Judges asked him, what he would do? Says he, rather starve, and dye in Prison than consent; the Court Fined and Committed him: But on better Consideration, discharged him without more ado. All the Court can do, being only to (carry them in Carts, if in the Circuit, along with them, and) keep them without Meat, Drink, &c. till will agree, 41 *Aff.* 11. says *Mir.*

Jurors

Jurors ought not to be threatned, but to be free, differing in Opinion, &c, 273. And it was resolved in Parliament, *Anno Dom.* 1677. That the Presidents and Practises of Fining, &c. *Juries* in or for giving their Verdicts, are Illegal. And *Keeling*, Cheif Justice of *B.R.* was called to Question in Parliament for such Practises.

Coke upon *Lit. f.* 369. says, If any Labour a *Jury*, Iustruct them, or put them in fear, or the like, it's Punishable as Maintenance or Embracery, either at Kings Suit, or at Parties; and perhaps, it would puzzle one to shew why a Judge is not within this Law; for how can he be said to do this as a Judge, when to do so is no part of his Office? And why should any usage alter the Case here any more than in other Cases of breaking the Laws; It's
much

much too any Judge should offer such a thing, considering he that Judges without a *Jury*, certainly Judges without Authority: And he that Judges with a *Jury*, but governed or led by him, Judges only by colour of a *Jury*, and by colour of Authority: and thus makes himself forsworn in and by the Oath taken at his being Created Judge, makes the *Jury* all forsworn, violates the greatest Priviledge of the Subject, infringes the most often confirmed Law of the Kingdom, and also does particularly the Party offended the greatest wrong imaginable, in as much as by colour of Law, and makes all the *Jury* accessaries to the whole.

Hence it's improbable any Judge should offer the contrary. But however, a *Jury* in any Indictment, Presentment, or Information, ought, and

and may give their Verdict, &c. according to their own Conscience, without any fear of Punishment one way or other.

And in any other Case, as where the King is no Party, but an Attaint happens to lye; they may be Punished no other way. Also no Punishment whatever lyes for or against a *Jury* which consists of above Twelve Men, 14 H. 7. 13. Nor does Attaint ever lye where the Witnesses are not on Oath, or for going against what any such Witness says; nor in any Appeal of Maim, Murder, or Felony, F.N.B. 107. Nor in other Appeals, as *Regist.* 122. *Attaint* 59, 62. & 22 *Aff.* 82. say. Nor does ever any Action lye against any *Jury* for going against their Evidence: And where an Attaint is brought, it

it must be Tryed by a Jury of Twenty four Men.

The only Cases the Judges have any Power over *Juries* in, are, where in their behaviours they become guilty of any such thing as the Judges may justly call an unlawful contempt, 4 E. 4. 27. 36 H. 6. 27. Or be guilty of Embracery, 5 E. 3. c. 10. 34 E. 3. c. 8. as receiving Bribes, Promises, &c. before or at the Tryal, &c. Or in Case of Concealment, The Justices of the Peace of every Shire, &c. may take by their discretion an Enquest, &c. to enquire of the Concealments of other Enquests taken afore them, and afore others, of such Matters and Offences as are to be inquired and presented afore Justices of Peace, whereof complaint shall be made by Bill or or Bills, &c. And if any such Concealment be found of any Enquest, &c. had or made within one year,
 &c.

&c. The Justices may Amerce or Fine them at Discretion.

3 H. 7. c. 1. viz. as much as is reasonable for such Offence ; as is said in a like Case by Lord Coke, 10. 140. and in Dalton, p. 541, 23. If any refuse to be on a Jury, not offering sufficient Excuse, he is Fina- ble, 7 H. 6. 12. So if any of ei- ther Jury give a Verdict, &c. as aforesaid, twelve not agreed. So the Grand Jury may not discover Evidence given them, Inst. 3. 107. Mich. 15 Jac. in B. R. Smith and Hills Case, 27 Ass. 63. Lamb. 402. Chron. 207, 272. Finch 29. So the Petty-Jury, if without License of Court, depart any whither upon any occasion whatsoever, after sworn, before Verdict given : Or that while, but especially after Evi- dence given, eat or drink : Or out of Court receive any Evidence from

from either side, may expect Fine and Imprisonment.

Thus much for what a *Jury* may do : Now something more how, and what it ought to do. The Oath it self, but that it's so general, would else be Instruction as well as Obligation sufficient. The Oath of a *Grand Jury-man* is, *I will diligently enquire, and true Presentment make of all such things and matters as shall be given me in Charge, or shall come to my knowledge concerning this present Service. The King's Council, my own and my fellows, I well and truly will keep secret. I will Present nothing for Malice, Lucre, or evil Will : Nor will I leave any thing unpresented for Love, Favour, Affection, Reward, or any hopes thereof. But in all things that shall concern this present Service, I will present the Truth,*

English Juries. 45

Truth, the whole Truth, and nothing else but the Truth. So help me, God. The Oath of the Petty Jury is, I will well and truly Try, and true deliverance make between our Sovereign Lord the King, and the Prisoner at the Bar, according to my Evidence. So help me, God. That of the Grand-Jury was part of it Anciently, *Quod neminem accusare velint innocentem*, To Accuse no Person innocent, *Il. Ethelred.* And *pour rien ne levray que je verite ne diray.* Nothing shall hinder me from speaking the Truth, *Brit. 12. 135. Crompt. 304.*

The Scripture teaches one his Duty upon an Oath. It says, One must swear in Truth, in Justice, and in Judgment, *Jer. c. 4. Dent. c. 16. Exod. c. 20. Dan. c. 5. Levit. c. 14. Zech. c. 13. Acts c. 5.* and the Proverbs in several places. In Truth,
with

with one's Eyes, neither in a Telescope nor Microscope; not proceeding by appearance or seemingness of things, not by adding or diminishing, not by aggravating or palliating, not by Equivocation or Reservation, not by Representing or Accepting the matter otherwise than really and truly it is, not presenting, &c. things, &c. doubtful, or not certainly true, as true; nor omitting any thing certainly true, but always as the naked Truth is, so and so *In Judgment*, not at a venture, as by casting Dice, &c. not as matter of Form, not rashly, perfunctorily, or negligently passing or running over things, not by implicate Faith, or in complemental Obedience, &c. not upon trust or belief, further than with, and upon good and great deliberation, consideration, Reasoning, and Satisfaction according to one's own Conscience, and because one's mature and settled judgment is
 so

so and so. *In Justice*, proceeding fairly, impartially, with Integrity, and according to the Merits of the Cause, without charging one with Murder that's Guilty, but of Manslaughter; and without Malice, Fear, Hope, Pity, Favour, Affection, Passion, Corruption, or other Prejudice, Byas, Consideration, or private or sinister End or Design. But all throughout purely, because Justice is so and so more than otherwise. And consonant to Scripture, as well as generally in all other things, so also in this are even Morals and Politicks. The Wise Men (so called) of Greece, were called so from their living Prudently, Justly, and Honestly; such also are they *Aristotle* calls so, 1 *Metaph.* &c. The *Stoicks* say, He's the Wise Man that sticks to Truth, *Neque quidquam fingit*, and abhors and banishes every thing else, not so much

much as admitting of any Stories, Fictions, &c. whatsoever. *Machiavel* says, *Judex cujusquam gratia nec potentia cedit, neque misericordia nec invidia nec odio comovebitur sed vere semper & incorrupte ex legibus judicabit.* Judges must not be moved for the Power of any one, nor for any ones sake, one way or other, nor with Pity or ill will, but always go according to Law, truly and without byas. *Justinian* speaking of Judges, says, *Eorum est manus puras Deo, Imperatori & legi prestare,* They must be inoffensive to God, the King, and the Law. *Non illum populi fasces, non purpura regum flectunt,* No Acclamations of the People, no Honours of the King, neither of these move them. *Contra rempublicam, nec contra jusjurandum amici causa, vir bonus non faciet.* Against the common good or an Oath, no Man will stir an inch,

inch, if honest, though it be for a Friends sake. *Judex ponit personam amici cum Judicis induit.* Judge Hales is a Friend, as Hales, but none as a Judge. *Si omnia facienda sint que amici velint non amicitia tales sed conjurationes putande sunt.* Cicero. What a Judge does at the request of his Friend, is really and truly no Friendship, but is making himself and Friend guilty both of a Crime. The *Areopagites* (were Judges that) heard Causes only in the dark, that they might take notice what was said, and not who spoke. And what is said of Judges by these Authors, must by us in like manner be applyed to *Juries*. The Book whereon Swearing one lays one's hand, is God's Everlasting Truth, and most Holy Word ; so that if one forswear one's self, one virtually in so doing utterly forsakes God, and his Mercy and Truth.

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Says

Says a Learned Man, part of the Oath is, *So help me God, viz.* I pray God he will never help me, if I shall not sincerely and faithfully keep this my Oath. *Cajetanus* says, 2 *Qu.* 98. Perjury is of its Nature a contempt of God. And as the Proverb says, *Malum est ludere cum Sanctis.* It's however ill jesting with edge'd Tools.

By the Oath of the *Grand Jury*, one's bound to observe as well the Charge which shall be given by the Court, as the form of the Oath it self. But this it's plain must be understood so far as the Charge is according to Law, and not contrary or repugnant to the Oath it self, and no further or otherwise.

Anciently the Charge was given in Writing to the *Jurors*, *Brit.* 9. *Braet.* l. 3. c. 1. *Dalton*, p. That the

the *Jury* might easier remember it, their Minds be refreshed, and perhaps, themselves Edified, &c.

What the *Grand Jury* does, is by way either of Presentment or Indictment. By *Presentment*, when they know of a Crime or Fault themselves, and give a short Note of the Parties Name, place of Abode, and Fault, without Form, referring it to the Court to put into Form. By *Indictment*, when the Party and Fault are ready brought them in Parchment, drawn up in Form. And indeed the most true difference is only, that the one is in Form, and the other not.

In an Indictment, first they must consider and understand it well and thoroughly : And if they can't understand it, ask the assistance of the Court, either to give them a

Clerk on Oath to *English* it for them, or otherwise as need shall require. Then they must consider if the Fault, as alledged with the Circumstances and Aggravations, amount to, and be a real Fault or not, and also worth complaining of; for *de minimis non Curat Lex*. The Law minds not every little thing, and this is daily experienced in Indictments and Ac. of Case. If it be no Fault, or one not worth complaining of, which in Law, as aforesaid, is all one, they reject the Bill, and meddle no more with it. If they find it a Fault, and considerable, as aforesaid, then they consider, if know it true so of themselves; which if they do, or other Evidence satisfy them it is, they Indorse, or write on the back-side of it, *Billa vera*, this Bill is true: But if they do not know it themselves, nor be satisfied by the Evidence, then

then instead of *Billa vera*, they write *Ignoramus*, We know not. And afterwards thus deliver all the Indictments into Court.

The Clerks of Court, to get Fees, and perhaps, some others for one sinister end or other, will be apt to say, that the *Grand Jury* ought to find an Indictment, or make a Presentment against any supposed Offence or Offender, though have but colour of Evidence, or a probability of the thing being true, and that what they do, is but matter of course, a Ceremony; matter of Form, barely an Accusation, &c. But that this is not so indeed is apparent, for to what end then is a *Grand Jury*? Only for show. The Law would certainly then have never required one to be at all: We see they are obliged to be sworn, and they are as much on their Oath

as any other Jury, which then should be the contrary. The very form of their Oath teaches us better. The Oath is, *Diligently enquire, &c. not negligently, &c. True Presentment make, not probable, &c. Nothing for lucre, &c. not excepting the Clerks, &c. According to Evidence, not Presumption: The whole Truth, and nothing else but the Truth*, which how can be at such a rate as the Clerks, &c. speak of?

But then they Object, that these words, *According to the best of one's Knowledge*, are added. If they be, it's against Law, *Min. 304. Brit. 12. 135.* And altering an Oath, is imposing a new one, which cannot be without an Act of Parliament, *Inst. 2. 479, 658, 719.* But however, May Jurors in such case wink, &c. that they may not know, &c.

These

These words are *best of*, &c. and not *worst*; they are *Knowledge*, not *Ignorance*; they imply the *best* one can know or find out: And not only what one already *does* know, for then what need the word *best*? And besides they relate to the word *enquire* as well as any other word, &c. So the more one considers them, the less one shall find they really alter the Oath.

Then, say they, all a *Grand Jury* does, is but presenting in form, and not in form as afore-said, and is only suppositious as it were, and nothing positive or as certain, grounding themselves only on this, that the form of the Indictment is, *The Jury upon their Oath Present*, instead of *The Jury upon their Oath say*; and so infer, that if any thing in the Presentment or Indictment be false, yet it's

no Perjury. Alas, to see Men in extremity what hold they'l catch at! Could *Argus* himself have seen this Exemption? No, unless blind. *Present* and *say* are undoubtedly here, and in such like Cases, Synonymous terms. To *Present* on Oath, is to give the Court to understand on Oath: And to *say* on Oath, is to tell the Court on Oath; and an infinite of Indictments be *say* instead of *present*, *Rast.* 263. *Kitch.* 100. *Co.* 9. 114. And *Fleta* goes so far, as calls an Indictment a Verdict, *f.* 113. The words also of the Oath be, *to truly Present*, and not *say*. And Lord *Coke* plainly calls the *Grand Jury-men* all willfully forsworn and Perjured, if wrongfully find an Indictment, *Inst.* 3. 33.

Then, say they, but Indorsing *Billa vera*, as aforesaid, implies
not

not that the *Jury* takes upon them to know or say the Bill or the contents are true; but *vera* there signifies probable, or fit for Enquiry. But then, why not another word used more properly and usually *Latine* for such a fence than, and instead of *vera*? And what is *Latine* for true, if it be not? And is not true the common accepted *English* word of and for *vera*? And is not *Billa vera* the Answer made to their Oath, that they shall true Presentment make? This is like the rest.

Then, say they, this is no Tryal, but in Order to bring to Tryal, and the Party is at no prejudice if the Bill be found. It's true, it's no determinative Tryal that finally concludes either Party, because it's but one of two which every one accused of a Crime must have as aforesaid. But it's so much a Tryal, as

Learned *Fleta*, f. 113. looks upon it no less one than any other. The form of their Indictment is the same of that of a Verdict. All things are, or ought to be alike in the whole proceedings, and to differ nothing, but the one to be before the other, and the later to be final, the other not. The *Stat.* of 23 H. 8. c. 23. Enacts, One shall be Indicted of High Treason in what County the King pleases. And the *Stat.* 1, 2 P. M. c. 10. says, That Tryals for Treason, shall be according to Common Law : This Act repeals the other, though speaks only of Tryals, and the other of Indictments, *Anders.* (1.) 104, 105. *Inst.* 3. 27. which shews an Indictment is a Trial. One of the *Grand Jury* can't be afterwards on the other. And why ? Says the Law, for he has once already found the Party Guilty, and if should not
again,

again; he must Perjure himself,
Brit. 12. 25 E. 3. c. 3. 7 E. 4. 14
Stanf. 158. It puts the Defendant
to Disgrace, Trouble, Damage,
Danger of Life, &c. It makes
him lyable to an Out-lawry, to
Imprisonment, &c. and to every
thing but very Death, &c. the fi-
nal Judgment it self. It gains Cre-
dit, and gives Authority to another
Jury to find one Guilty. It pro-
duces this Effect, that if the other
Jury find one guilty never so wrong-
fully, no Attaint lies against them,
nor other Punishment. And what's
the Reason? The Law says, because
he is found Guilty not by these
other twelve only, but in all, by
Twenty four or more, this later
and the other *Jury* too, *Attaint 64,*
60. Attaint R. a. 18. v. 8 H. 4.
23. b 14 H. 7. 13. So if one be
Indicted, any one may bring an
Appeal, though never so wrong-
fully,

fully, &c. against him, whereas he that brings one against any one that was never Indicted of the same Offence, may be lyable to great Punishment, if wrongfully brought, *Stanf. 172. Coron. 178. 40 E. 3. 42.*

Where Peers be indicted for Treason, Felony, or Misprison of either, they not only suffer in Honour, Liberty, Vexation, Danger, Trouble, Charges, and other Inconveniences, as aforesaid, another does, but must with a more tender sense, and in a much greater measure, as they be so much greater persons, &c. And they can have no other Tryal on Oath, for their future Judges or Jury are none of them on Oath, *Inst. 3. 89, Co. L. 156.* They can except against none of their Jury, though have what Cause soever possible, *Co. L. 156. b* They must be Tryed by such as shall be chosen against

against them, such, as perhaps, shall not be Neighbours, but picked any where up and down the whole Kingdom; such a Jury, as perhaps, shall not be above twelve in all, whereof then if any seven, or any time the major part agree to find them Guilty, it shall be so, though the other five, or lesser number be utterly against it. So that upon the whole, if a Peer have but seven Peers among all the rest that bear him ill will, or either any ill wisher that can make him so many of them his Enemies, he must Die, &c. fall back, fall edge. And to help the matter, he shall always be sure of the ablest Council in the Kingdom to manage the Cause against him.

Suppose one should ask any Honest Man this Question. Were he not on his Oath, yet would he find
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an Indictment of course, &c. to expose one, and put him to such Inconveniences, as aforesaid? Certainly, says he, no. And the Monster that would, does it wrongfully, because is not certain he does otherwise. And being on his Oath, as aforesaid, it's not only doing wrong, but tainting himself Crimfon-red in Perjury too; sure a Malicious way of doing wrong. It's doing wrong also by colour of Law and pretended Authority, the greatest Mischief and Injustice, says the Lord *Coke*, of all other, *Inst.* 2. 48. The damage, &c. too in all these Cases is the greater yet, that the Party can very scarcely, if at all, expect any Reparation or Amends: Whereas in all other Cases he may easily. For against the *Grand Jury*, or any of them, no Action lyes, in as much as doing what they do on their Oaths; the Law will not presume

presume, &c. any Malice, &c. in
 them. And though one be Indicted
 at the Instance, or upon the Endeavours
 of some other Person (all
 the Jury, as aforesaid, being sworn
 to Secrecie) can one easily discover,
 and prove who this Person is,
 what he did, and prove it at a
 Tryal? Which yet one must do
 fully, if expect any thing but making
 bad worse. And might one
 recover damage, &c. yet it's damage,
 &c. to be put to the trouble
 and hazard of the Recovery. Well
 therefore, says Eleta, f. 52. *Valde
 necessarium est in omni presumptione
 in inquisitione de vita & membris
 Juratores diligenter examinare.* It's
 an exceeding necessary thing that
 the Grand Jury should make dili-
 gent Examination, before presume
 any thing, either in Case of Life
 or Member. *Just. Dalton's Book,*
p. 539. says, no less care or con-
 cern

cern at all lies on the *Grand Jury* than does on the *Petty Jury*.

The Law (to see its Nature, how it inclines generally, that one may the better guess in this matter) it is not with us like those of *Draco*: It's as tender of the Lives, Liberties, and Credits of the People, (none can deny in all Cases else) as a Mother of her Child, and why then not in this also? It will presume nothing dishonest, &c. in any one, or any time, but it will, and always does presume all Persons and things Honest, True, Innocent, &c. till the contrary be proved, *Co. L. 78. b* As *Ovid* says, *Sit piger ad penas princeps ad premia velox*. So *Lamb. Sax.* Laws cry often Clemency and forgiveness as well as Justice. And *Lex Angliæ Lex misericordiæ est*. Says *Coke, Inst. 2. 315*. Like the Laws of Scripture, whence

whence it was first derived, which shews Mercy is not opposite to, but part of Justice, 1 John 1. 9. Psal. 71. 1, 2. Jer. 18. 7, 8, 9, 10. Ezek. 33. 13, 14. The Laws of England, the Laws of Mercy. And says a Great Man, *Justitia semper mitiorem sequitur partem*. Justice leans that way which is the milder, One brings an Appeal, if the Jury be doubtfull, the Defendant shall be acquit, and the Appellour Imprisoned, *Fleta* 52. *Mir.* 224, 273. So a Jury being doubtful if one were a Villain or not, was therefore free, *Fleta* 238. *Bene tibi precipiunt* (says Cicero) *qui vetant quidpiam agere quod dubites æquum sit vel iniquum; æquitas enim lucet ipsa per se, dubitatio autem cogitationem significat injuriæ*. They do well, that forbid one doing a thing when dubious, whether right or wrong; for where it's right, the thing is
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necessarily as clear as the Sun. But any doubt speaks the thing not to be so. As if a Physician give one Physick, he must give one that he is sure will do one good, or no harm, and not what he doubts may do one harm. It's also plain, if I doubt, I must not say, I am certain (as *Billa vera*) but I know not certainly (as *Ignoramus*) else I tell a Lye. It's very remarkable too about all Indictments, the *Jury* only says, either *it's true*, or *we know not*, and never that *it is not true*, which shews, if they be doubtfull, or not fully satisfied, the Indictments must be Endorsed not *Billa vera*, we know it is true, but *Ignoramus*, we do not know it is true. And the Law does not put it upon the *Grand Jury* to say the Bill is not true, if they do not find it, though does put it upon them to say positively, the Bill is true, if they find it, and so encourages

encourages the finding Indictments
Ignoramus. Fortesc. says, It's bet-
 ter Twenty ill Men were unjustly
 saved, than one unjustly Condemn-
 ed, 62. For Mercy and Pity is on
 the one side, but on the other In-
 justice and Cruelty. Says Bracton,
Tutius est reddere rationem miseri-
cordie quam Judicii. It's safer giv-
 ing an Account of one's being Mer-
 ciful, than otherwise. The Saxons
 in doubtful Cases only Appealed to
 God for Discovery, and left all only
 to him, viz. Where the Case was
 doubtful, if Guilty or not, or clear
 and manifest Proofs wanted, they
 had four Sorts of Tryal, *Spec. Sax.*
l. 1. First, *Kamp-fight*, or by Bat-
 tel. Secondly, *Fire-Ordeal*, by
 holding red-hot Iron in his Hands,
 or walking bare-foot over it. Third-
 ly, *Hot water-Ordeal*, by putting
 one's Arms up to the Elbows in
 seething hot water. Or, Fourthly,
 Cold

Cold Water-Ordeal, by casting one into the Water

with a Rope under his Arms. Where-
But a Jury first past upon them, Rot. Temp. R. S. Jo. Lord Hales his Collections.

of the three last were used, one or other of them, where the Party was more vehemently suspected; *Versteganus* and others. But Pope Stephen the 2d. by his Decree utterly abolished them all, and afterwards so did the Parliament, 3 H. 3. *Memb. 5.* Judging it more fit the Party should be acquitted than prosecuted where the Case was doubtful. So that one must know beyond all doubt, before say *Billa vera*, else say *Ignoramus* which is in *English*, we doubt, we do not know, we are not certain if it be true. *Paribus sententiis reus absolvitur*, *Inst. 4. 64.* And says *Brit.* If a Jury doubt at any time, they must find for the Defendant, 245, 130, 136, 219, 213. Judge Frebern

Frebern was Hanged for Judging one to Death, where the *Jury* were doubtful in their Verdict, *Mir.* 298. Anciently if a *Jury* Indicted an Innocent Man, another might be impanelled to go upon this *Jury*, as Offenders, &c. *Mir.* 101. *Aussi sont homicides de volunt, faux Jurons & ceux que Endictent fausement.* Jurors that falsely Indict any one, be guilty of wilfully killing Men, *Mir.* 34, 36. They shall be reputed and adjudged Infamous, and suffer Corporal Punishment, that find an Indictment against an Innocent Person, *ibid.* 251, 252. 254. 256. Or if an Innocent Person be adjudged to Death, &c. if they could have holpen it, *ibid.* 256. An Appeal lay against a *Jury* in such Cases, *ibid.* 136. *Brit.* 14, 137, 237. If they any wise offend so, *Ignorantly*; yet this excuses not at all, unless they could not possibly know better,

better, *ibid.* 257. And negligence in or of knowing better, makes their fault the worse, *ibid.* And the greatest Oracle of our Laws, *Co. L.* 115, 394, 45, 94, 113. has it, That what ever was Law, is yet, unless altered by Act of Parliament, which this never was. Whereas on the other side, if a *Grand Jury* do not find the Bill against any one, there can be no harm then to any body; but another Indictment may some other time be brought when there's better Evidence, or a worse *Jury*. For though one's Life, &c. shall come but once in danger, or on Tryal before the *Petty-Jury*, it may yet a Thousand times before the *Grand Jury*, for they never say the Party is not Guilty, but at most only say *Ignoramus*, as aforesaid.

Any thing any *Jury* does, ought to be. *Quoddam Evangelium*, like what

what they laid their Hands on, taking their Oath. When they write *Billa vera* on an Indictment, they undeniably compare the truth of the contents therein to the truth of the Gospel, and this upon Oath. Thus one would admire how it comes to pass, that they of the *Grand Jury* should often hear but one side. Their Oath, it's apparent, is against this. It says, *Present the whole Truth*, not concealing or omitting any part of it; which implies as well all one side can inform them as the other. And so appears by less strong Cases far. An Attaint lies against a *Jury* (swearing to well and truly Try the issue between the Parties) when every word of the Verdict may yet be true, only it not being the whole Truth. As if one having had common appendant time out of Mind, bring an Affize of the Common, making

making his Title that he hath had common time out of Mind, &c. (without speaking of the Appendency) and so the *Jury* find for him. For thus he should else have Common in gross, when his Right or Title is not to *such*, but to Common Appendant, *F N B.* 107. *a.* 10 *E.* 4. 17. 49 *H.* 6. 17. So one having had a Rent in Fee, as Forester of such a Forest, time out of Mind; in an Assize for it, makes Title by saying he had a Rent out of that Land, time out of Mind, &c. (without saying, as Forester, &c.) and the *Jury* find for him, for he hath not had the Rent by Prescription, as must be understood by the Claim and Verdict, as aforesaid, *ibid. b. Co.* 5. 78, 79. So that it is not enough for a *Jury* to say the Truth, but the whole Truth, though too no such word as this of whole Truth, be mentioned in the Oath.

Oath. It proceeds, and says, *and nothing else but the Truth*, which how can possibly, or any Jury-man be satisfied in, unless hear both Parties? It says, *You shall diligently Enquire*, &c. not by halves, or but hearing one side only. It's a Maxime, *Qui statuit aliquid parte inaudita alterâ æquum licet statuerit haud æquus fuerit*. He that Judges or determines any thing when but one side only is heard, does unjustly: And the Judgment, or Determination, though in it self be never so just or right, yet shall he no wise be accounted a Just Judge, &c. Is it not a common saying, *One Tale is good, while another is told*? One at this rate might be Indicted for a Cut-purse, when but an Honest Glover; so might Surgeons, Sheriffs, Bailiffs, Jaylors, Hang-men, Attorneys, &c. for but doing what belongs to their severall and respec-

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ctive Professions, as the matter may be managed, and yet saying nothing but Truth neither, only not the whole Truth. Is there not in all Determinations else, the Hearer, and *Defendant* as well as *Complainant*? Thus erred *Judah* the Son of *Jacob*, in Judging *Thamar* to be Burnt, upon Report, when she was unheard, *Gen.* 38. 24, 25, 26. So was *Joseph* falsely accused of Lying with his Mistress, and cast into Prison, *Gen.* 39. 19, 20. So was *Mephibosheth* falsely Accused by *Ziba*, and deprived of all he had, *2 Sam.* 16. Which being all Presidents, and Damned in Scripture, must, or shall any one be so hardy as to embrace and follow them now? Either one's Guilty or not; if be, let him yet have fair play for his Life, &c. If not, why should he then be Indicted? So that, why should he not be heard? Else one's Condemned first, and heard after; or indeed, Hanged

Hanged first, and Tryed after, or little less. The true intent of the Law herein seems, as if Men were to be handled not thus, but that the Defendant should be heard at first, that if he then could give satisfaction, &c. he might be at no further trouble, &c. And if he could not, that he should have such trouble, &c. and having notice thus, might prepare himself the better, and so not be surprized at the final and concluding Tryal, or have any colour of pretence that he was surpriz'd, or any wise unprepared at this final Tryal. This method being most honourable for the King and the Law, and also most safe for the People. And the Reason why it was ever otherwise, seems barely a Result of some Artifice of the Clerks, to get themselves Money, imposing on the *Juries*; or from this, that Presentments being made without the Party heard, therefore the *Jury* thought they

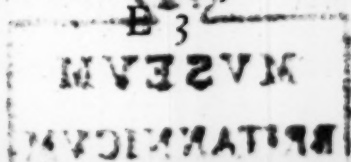
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might find an Indictment likewise. Whereas they ought always to distinguish ; for a Presentment is on their own knowledge, when they know all the whole matter, even what the Defendant can say for himself ; but an Indictment is found upon Witnesses, which tell their tale to a hairs-breadth, &c. as makes the most for the side they are produced of. And at length, after some few Presidents, it has now grown into Practice. *Dato uno absurdo mille sequuntur.* All can be pretended why it should be so now, is but Practice and President. And when it's against Justice, against Truth, against any ones Judgment, sure one ought rather to Correct than approve of, or follow such Practice or President. At leastwise a *Grand Jury* ought hear both Porties, if present, or easily, or conveniently to be heard.

It


It would likewise amaze one to see how the Clerks, for their gain, or others for other Ends, have often prevailed with Jurors to find a Bill true, &c. when in all the Circumstances of Aggravation, or most of them, false, if not in the Fact it self; and those Circumstances too altering the very Fact as alledged about as much as white Feathers would a black Crow.

Considering how true Presentments, Indictments, and Verdicts ought to be, and that the whole Truth, and nothing but the Truth must, or may be in them: That the *Jury* undertake the Bill is altogether true, not only as to the substance, &c. or in general, but even in every particular, all the Circumstances, Aggravations, and every individual word (for if it be not true in the least word, it's not true, but



but false, and Perjury.) *Stanf.* says well, f. 96. ^b *De faire bon Enditement est requisite à conuistre & d'apprendre que sera dit Treason ou Felony ou non.* To perform the Duty of one on the *Grand Jury*, it's necessary to learn and know what's called Treason, what Felony, &c. and what not: Hence also one learns, one must not in an Indictment, &c. call, or suffer called Felony, Treason; Man-slaughter, Murder; nor one Crime by the name of another: Or mention, or suffer mentionèd, words spoke, or things done, other or after another manner than really and truly were said or done; and therefore the Judges give the *Grand Jury* to this day their Charge so distinguishing, particular, and directiue of all, and all manner of the several Crimes, their Natures, and how to call them, &c.

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**MVSEVM
BRITANNICVM**

When the Clerks draw an Indictment, Information, &c. they'll not only alledge and insert in it the very Fact, &c. one is accused of, but craftily, and full of Art stuff and load it, into the bargain, with several fictitious and sleigh allegations of their own, to swell up, and aggravate the matter ; as Circumstances of Malice, or design, &c. in the Party when did the Fact, spoke the words, &c. So that sometimes from a Mouse, a Mountain ; from nothing, or what's inconsiderable, it will in such a dress shew and strut like a Giant, a Monster, &c. And all this, forsooth, they'll call matter of Form, and then endeavour to perswade a *Jury*, if they find the chief matter, or that part which they'll call the matter of Substance, true, they must of course find all the rest which *they* please to call matter of Form, true also.

This usual way of wording Indictments, is so notorious, dangerous, hurtful and grievous, that it several times, and in all Ages has been complained of by all Persons whatsoever, except the Clerks and Prosecutors themselves, whilst Clerks and Prosecutors. It has been a Complaint in and of Parliament, by King, Lords, and Commons. See 4 H. 4. c. 2. 37 H. 8. c. 8. This is that whereof may be said, as was in *Courtin Hertsey's Case*, *Aliquid creare ex nihilo malum, Diabolicum est*. It's the part of the Devil himself to make a small fault be, or seem a great one. But no Complaint, no Argument will, or can prevail with a Covetous Clerk getting Fees, or a Malicious Prosecutor troubling whom he has Envy or Malice against, to desist their Advantage. And as the true Circumstances of any Crime do always, or
mostly

mostly aggravate or alleviate it, and all those suggested thus by the Clerk, if the Bill, &c. be found by the *Jury* (though pretended only matter of Form) become thus as true, and the Judges must adjudge a Punishment accordingly, as if all were really true : Thus is a Trap set to catch the *Jury* and Defendant ; the *Jury* to Perjure themselves, and wrong the Defendant, and the Defendant to be adjudged of a Crime, when perhaps, guilty of none, or at least of a worse Crime than truly he is. A *Jury* therefore ought first consider, as aforesaid, if the matter of Substance or chief matter be Criminal at all ; and if be, then if considerable : And if be not Criminal, or considerably Criminal in it self ; then if the Circumstances, as alledged, make it so ; and if not, then to reject it. If it be considerably Cri-

minal with or without the Circumstances, then consider if you know it of your selves, or by Evidence be satisfied it is true, both it self and the Circumstances : If the matter it self be not true, you reject the Bill (for where's no body is certainly no shadow :) If the matter be true, but the difficulty be about the Circumstances, then consider if they be material ; if not, you find the Bill ; if be, then consider if they be consistent, or the matter will bear them ; if not, then reject the Bill, &c. or at least strike them out of the Bill, &c. If be, then consider if they be true on your own knowledge, or by the Evidence given you ; if be, then find the Bill, &c. if not, they must be struck out, or the Bill return'd *Ignoramus*, &c. As for Example, The *matter* must be *Criminal and considerable* : This partly appears before ; but further, Suppose

pose the Apprentice of *A.* get a Woman with Child, and secretly run away upon it, and *A.* procure a Warrant to Apprehend him for it: But *B.* a stranger knowing of the Warrant, Lodges, Comforts, and Assists the Apprentice in unknown places, that the Warrant can't be served; the stranger is not punishable, 15 *Jac. B. R. Vaughan's c.* If a Commission be granted to two, and one of them execute it alone without the other, and accordingly Fine people, &c. yet no Indictment lies, for it was Error of Judgment, 27 *Aff. 23.* If one say to a Justice of Peace, Executing his Office at his House, &c. and not on the Bench, certain scandalous words touching his Office of Justice, yet he may not be Indicted for it, *Hides c. Trin 11. C. 1. B. R.* And so was Sir——*Sackfield's c.* these being all inconsiderable faults. And as to whether *the Circumstances*, or
other:

other matter than the Principal *be material or not*. Those words or parts be only words of Form, and but those only which are necessarily implied, as that if the Principal or the rest be true, these must be. so too, and can't possibly be otherwise, and thus become needless to be proved, being before proved, as and by the necessary consequence of the other Proof; so he that proves a shadow, proves also a body, since there must be a body to cause it: and those words be material which may cause a different Judgment or Punishment, or that aggravate the fault, make it greater, of another nature, or any wise alter it, and therefore are not to be presumed, but must be proved. The *Jury* must observe also *whether consistent* as an Indictment of or for Felony, saying, that one such a day Feloniously cut down such Trees, and carried them away; or with Force and Arms

Arms such a day cut down such and such Trees, and Feloniously carried them away; this is inconsistent, for Felony can never be about standing Trees, *Indict.* 4. So of growing Apples, of Houses, or any thing fixed to the Free-hold: But all it can amount to, is only Trespass, unless the falling appear by the Indictment to be one time, and the carrying away, another. So if a Mad-man, a Child, &c. which have no discretion, be said to do things maliciously, or designing any thing, this is inconsistent or impossible, in as much as no Malice or Design can be in such. *If necessarily implied, for if be not, they must be proved, &c.* Every Jury must go by *probata*, what's proved, as well as *allegata*, what is only alledged. Where one's Accused of knowingly keeping a Dog wont to worry Sheep, &c. the knowledge must be proved as well as the rest, *Cockram and Davies, c.*

B. R.

B. R. 17 C. 1. So the Lord *Shafts-bury*, when sued Lord *Digby* for maliciously speaking such and such words, he proved the malice as well as words. If one pleads a Feoffment by Deed, and the other denies it, it must be proved to be by Deed, *Co.L. 281.^b* So if one be Indicted of Murder, as that he with Malice, Fore-thought, killed such a one, the Malice fore-thought must be proved; for in these Cases the killing might be either by chance, as the glance of an Arrow, &c. by giving Physick, by a Champion in Tryal by Battel, by a Hang-man doing his Office, or by ~~one~~ *non Compos mentis*, &c. In which Cases is no Malice, and therefore the Indictment not to be found: So the words might be spoke in Jest, or a Thousand other ways, and not maliciously. So one might keep such a Dog, and not know he was such, and

and the fault would then be none at all in him. The Law also may several times be broke in the letter, yet without any fault, if the intent of the Law be not broke : As when things are done to avoid a greater inconveniency, or by compulsion, or for necessity, or by involuntary Ignorance, &c. And in these and such like Cases the Party ought not be Indicted, though the matter be true in it self. The Romans had a Law, *He should dye that climbs over the Wall in the Night* ; yet one doing so to discover their Enemies, was by the Senate adjudged Innocent, and Rewarded. So it's Lawful with us to pull down another's House when a Fire happens, or in time of War, to prevent a greater Mischief. So one being to appear to a Writ, but hindred by Floods, Sicknes, &c. does not, he is Excused : One forces and uses one's hand

hand to kill a third Person, he is only Guilty.: So an Infant, or one *non sana memoria*, kills another, it's excusable. So that where any Fact or words in an Indictment might be as well under any of these Circumstances, as what other the Clerk or Prosecutor is pleased to alledge, these alledged must be proved, for it's plain, are not necessarily implied. And yet if a Man should do any wise thus, the Clerks will draw up the Indictment or Information as if none of these Circumstances were in the Case, but that it was Maliciously in contempt of the Laws, &c. So it seems hard a Man should be Hanged for stealing under a Necessity, where the taking is upon absolute necessity indeed, and it's not the parties fault, but misfortune, he fell into such necessity: And especially if the Party whom the taking is from, have not the

the like necessity for the same thing, on the Person that takes be very Serviceable or Profitable to the Kingdom or Common good, &c. yet he must be, though the thing so taken be not of the value of 13 *d.* if the *Jury* agree he did it Feloniously; whereas one guilty of Perjury, though does one a hundred thousand times more harm, shall only suffer an inconsiderable Rebuke. And why should a *Jury* in this Case find it done Feloniously, this was done under Force and Necessity, to preserve a Man's Life, &c. instead of an House, &c. and what's said Felonious, must be, *fel-leo animo*, with an ill affected Mind, with a Mind not barely to do the thing, but an itching also to do mischief (only this itching indeed shall be presumed, unless cause appear to the contrary.) As if one takes a thing out of anothers possession, claim-

claiming it with some colour as his own, &c. this is adjudged no Felony. Why? for not done with any Felonious intent, as appears by his claiming, &c. So the like stealing, as aforesaid, was not for mischief-sake at all, but for necessity, &c. Thus *David*, against the Law took and eat that Bread which was provided for the Table of God only, *Exod. c. 29. 1 Kings 21.* Our Saviour and his Apostles plucked off, and eat the ears of another's Corn, *Mat. 12.* And he, because he had need of an Ass, took that was none of his but anothers; and had *Lazarus*, ready to perish, taken *Dives's* crumbs against his will, &c. yet it seems he had no more sinned than he mis-behaves himself, that does what the Lord bids, and the Steward forbids, under the Rules aforesaid. A *Jury* therefore not observing the Rules aforesaid, gives a Verdict

Verdict not only against the present and immediate Defendant, but also in him even against *David, Christ, &c.* represented thus in his Case. In the Civil Law (that of the Admiralty particularly) if a distressed Ship takes water by force of another where is plenty, it's no Theft; because of the necessity, so adjudged several times. If an Indictment mention one Seditiously, and designing to disturb the Government, and to withdraw from the King the love of his Subjects, said of him such and such words, here the words might, perhaps, be spoken within the Priviledge of Discourse in Parliament, or in a Jocular way, or Ironically, when one means the contrary; or by way of Supposition in Argument, or when one meant a contrary thing or no harm at all; and this perhaps too, explained at same time in other words,

words accordingly, or the words in the Indictment be but part of the Sentence, &c. or transposed, or some how else altered. So, if a Complaint be, that one falsely and maliciously, and withal designing to break his Credit, and ruine his Trade, called such a one a Bankrupt; here, perhaps, he was a Bankrupt then, or no Trades-man at all; therefore in these and such Cases, the Circumstances alledged being not implied necessarily, though the Fact or words were spoke, they must be proved. But to instance some Cases adjudged by the Judges themselves: If *A.* bring an Appeal against *B.* and *B.* is after acquitted; now, should *B.* Indict *A.* for maliciously, &c. bringing the Appeal, the Indictment ought not be found, if *B.* were before Indicted of the same fault he was after Appealed against for, because his being Indicted before,

fore proves there was at least colourable Reason why the Appeal was brought, and not Malice only, *Coron.* 178. 40 *E.* 3. 42. A Surgeon was Indicted, for that he by negligence in Curing one's Hand, maimed it; the negligence must be proved, 48 *E.* 3. 6. 11 *H.* 6. 18. So in Actions for words, which holds the same Law as in Indictments, &c. *A.* sues *B.* for falsely and maliciously calling him, being an Heir, a Bastard; Action will not lye, if *B.* pretend himself Heir, for then it was not maliciously, but only as it were in order to get or claim the Land, &c. And it's Lawful thus to slander another, justifying one's own Title, *Co.* 4. 10. So *Molton* sues *Clapham*, for that a Suit depending between them, upon reading certain Affidavits in Court, *Clapham* openly then and there falsely and maliciously said, there is
not

not a word true in the Affidavits, and that he would prove it by 40 Witnesses ; here the words, though were agreed false, yet being not spoke maliciously, but out of other design, as in his defence, &c. as aforesaid, Action does not lye, *B. R. 14 C. 1. Rot. 459.* So a Counselor calling one a Thief at a Tryal, the like ; for it's not malicious, &c. if material for the Cause he manages, *Montagues c.* So where *A.* says to his Friend *B.* that *C.* hath the *French Pox*, therefore advising him not to keep him Company ; for spoke as Advice to a Friend, and not maliciously, *James and Rudley's c. 40, 41. El. in B.* And thus is further seen the Cause and Occasion of speaking words, or doing any thing, must be considered as well as the words or Fact : And says *Coke, This is a General Rule, Co. 4. 14.* Also it's another Rule, All Offences in
Fact

Fact or word, ought in construction to be made the least of possible. *Verba accipienda sunt in mitiori sensu.* Words shall be taken spoke in that sence which is most innocent, &c. See of this several Examples, Co. 4. 17. Hob. 473. C. 4. 19. Co. 4. 13. for the Law will *presume* Innocency further than down-right proved, as aforesaid, to the contrary. And if *Juries* should not be cautious, as aforesaid, one might be Indicted, &c. for saying *The King is a fit Man to Govern*, or for any thing in the World. Suppose *A.* be Indicted for maliciously, and with a Design to withdraw the Kings Subjects from their due Allegiance, &c. saying, *The King is a fit Man to Govern*, and *A.* should be found Guilty of it, because he said these words; *A.* would be in a sad case, the Judges must give Judgment, as if the words were spoke Ironically, or

'or in a contrary sence than they
 'were, for *so* the Circumstances al-
 'ledged import, *though* be found
 'of course. If a *Jury* find an In-
 dictment, &c. with the word *felo-*
nice in it, they find one Guilty of
 Felony, be the Fact what it will,
 and so as a Felon the Defendant must
 suffer: So also if the word *prodito-*
riè, for High Treason; and why
 may not they as justifiably find
 these words of course, as other not
 necessarily implied? Where an In-
 dictment, &c. is grounded upon a
 Statute, then every little word must
 be proved that is also in the Statute,
 though seeming implied, or little
 more than immaterial; this *all a-*
gree. For want of these; and such
 like Observations, one *Tho. Burdett*,
 Esq; was Condemned, Hanged, and
 Beheaded at *Tyburn* in *Edward* the
 Fourth's Time, when the matter
 proved was only, that he being
 absent,

absent, the King Hunted in his Park, and killed a white Buck, which Mr. *Burdett* fancied above the rest of his Deer, and that Mr. *Burdett* hearing of this, wished the Bucks Horns in his belly that Advised the King so to do, *Speed's Hist.* 700. Much like was it also with one *Walter Walker*, who was Beheaded in *Smithfield*, Anno 1476. when all proved against him, was only, that he (Living at the Sign of the Crown in Cheapside, London) said to his Child, to pacifie him when he cryed, *Peace, peace, Child, thou shalt be Heir of the Crown.* But who can open some *Jury-mens* Eyes to see how like an Ox led to the Slaughter they be imposed upon, and cheated to cheat others of their Lives, Fortunes and all that's dear to them: though by their Example too of Acting thus they make Presidents, and give countenance to

F

after

after Juries to be like themselves, and consequently expose and render themselves, they know not how soon, in the same predicament, and to be Punished as the Criminal was they Punished. *Or by the Evidence given you.* 'Evidence is only such 'Testimony that makes somewhat 'relating to the issue or matter in 'question clear, manifest, and plain 'to the Jury; hence says *Coke Lit.* 283. *Probationes debent esse evidentes & perspicua.* And thus is it, all the Witnesses or Testimony in the World of things impossible, repugnant, inconsistent, &c. can be no more than *bare Testimony*, and cannot any wise amount to, or be called *Evidence*. Herein the Jury must consider the Credit and Authority of the Evidence, and the matter or extent of what is Evidenced. *First*, If the matter proved amount to such plain and full
Proof

Proof as is required. An Indictment laid against three Persons may not be found against all three, when the Evidence is only against one or two of them; nor if laid against one Person for three faults, may it be found against that one for all the three matters, when but one or two of them are proved; nor when the Evidence is but to part of a matter or fault, may the Indictment be found for the whole; but, as aforesaid, all found must be proved. Indictments, &c. as aforesaid, brought upon, or referred to *any Statute*, the words of the Statute mentioned in such Indictment, &c. must be proved very strictly, even to a tittle; the Proof must hit the Bird in the Eye. As one Indicted on the Statute for *maliciously disturbing a Minister at Divine Service*, every one of these words must be proved; so for *wilfully and corruptly forswearing*

one's self; so for one's gain keeping a Gaming-House. But in other Cases, as at Common Law, if the proof and words in the Indictment, &c. differ either in the *matter*, or the *form*, or *manner* inconsiderably, or so as the difference be not somewhat considerable or material, as aforesaid; such is indeed no difference in Law, nor by the Jury to be taken as any. In the *matter*, as in a Complaint for these words, *B. is a maintainer of Thieves, and a strong Thief himself*; here the word *strong*, signifying little or nothing, need not be proved spoken, *Dy. 21. 75.* But if the Allegation and Proof materially differ, otherwise; as for these words, *If B. might have his will, he would kill all the true Subjects in England, and the King too.* Now, the Proof being that the defendant said, *I think in my Conscience that if B. &c.* the best
Opinions

Opinions in this Case are, that this is not sufficient Proof; for the words alledged are more positive and absolute, and move Credit more in one's Ears than those proved, and so are not in effect the same, but materially differ. So of these words, *B. procured eight or ten Witnesses of his Neighbours to Perjure themselves*, the Proof being only that the Defendant said, *B. had caused eight or ten, &c.* This is no proof, for one may be a Cause, and yet not a Procurer, there being remote Causes, *causa sine quâ non*, as well as others so nigh, as that of procuring. Such a Cause as this B. might be, though only Plaintiff or Defendant in a Suit, for had there been no Suit, there could be no Perjury. And the most favourable and innocent sense of words is to be taken, and no other. As for the *manner*, An Indictment being for Murder *b^y*

Poyson; if the Proof be it was *not* by *Poyson*, but a Weapon, Burning, Drowning, &c. this will not do; for the manner proved is of another nature proved than alledged; but if the difference were only thus, that the *Poyson* alledged were of one sort, and that proved of another, this being immaterial (both agreeing it was by *Poyson*) the Proof may serve. So Murder alledged to have been committed by a *Dagger*, the proof being it was by a *Sword* or *Bill*, may serve; but proof by *Poysoning* will not do. If an Assault and Battery be alledged to have been at *A.* the proof being it was *not* at *A.* but *B.* may serve, provided the Offence be neither greater or lesser, whether committed at *A.* or *B.* But if the place alledged aggravate the fault, it's otherwise; or if both places be not in the same County. So of the like difference

difference in time alledged and proved. Now, as to the Credit and Authority of what is Witnessed : 'It's no proof or Evidence to a *Jury*, 'which is against their own knowledge, nor any other but that only which confirms them in what 'did know, or acquaints them with 'what did not know. The only Reason, said my *Lord High Steward* at *Lord Cornwallis's Tryal*, why a Prisoner is allowed no Council in matter of *Fact*, or in any thing but matter in *Law*, when *Life or Member* is concerned, is only this, *The Evidence whereby he shall be Condemned, ought to be so plain and evident, that all the Council in the World may be presumed able to say nothing against it, or in his Defence.* Nothing ought so much as raise a suspicion, says *Horne*, but what comes from grave and good People, those which be *Credible*, and heed

what they say, *Mir* 200. And not from others, as ill-tongued, ill-disposed, &c. People, *Bract. Brit. Stanf.* The great Lord Coke says, of old time (as yet, says he, indeed it ought to be) Any Indictment was not to be found but on Credible Witnesses, and plain and direct proof; and never upon Probabilities or Inferences, &c. *Inst.* 2. 384. The Famous *Montagne*, p. 1040. says, *à tuer les gens il faut un clarté bien lumineuse & nette.* And the Lord Coke, *Inst.* 3. 25. It's most necessary, as many hold, there should be two good Witnesses produced to the Grand Jury to prove every Indictment. And the Proof, says he, ought to be more clear than Light. Every Jury must always remember they may presume nothing but Innocency; and Innocency, &c. they ought, until the contrary proved. Of presumption and Argumentative Verdicts,

dicts, &c. finding one Guilty, there be several very sad Examples. One the Lord Coke tells of, is, There being two Brothers, one dies, leaving an Estate and an only Child, the other Educates it, and one Night Correcting it, it cryed, Good Unkle, do not kill me, and next Morning it was gone no body knew whither. This Brother is Accused of its Death upon Evidence of the matter aforesaid, that he beat it, it was Young, about Nine years old, it cryed, as aforesaid, it was never heard of since, and that the Unkle enjoys an Estate by this. The Jury find him Guilty, and he was Hanged, but about a year after it returned safe and well, Inst. 3. 232. The Scripture enjoyns the use always of two Witnesses at least when yet the Punishment then, and there was so much less than now with us, for the Crimes to be punished, Deut. 17. 6. 16. 19. 15. Mat. 18. 16.

Jo. 18. 27. 2 Cor. 13. 1. Heb. 10. 28. *Vox unius nullius vox.* One is none, l. 8. C. de testibus. *Quædam sunt causæ quæ plures quam duas exigunt testes, nulla tamen quæ unius testimonio terminetur*, says the Civil Law. In some Cases there must be more than two Witnesses, but never fewer, c. Licit 23. in fin. extra de test. By the Ancient Laws of England, no Indictment was to be received against a *Presbyter* without three, or at least two Witnesses; against a *Cardinal Deacon* without twenty six, or at least twenty four; against a *Cardinal Presbyter* but with sixty four, or at least forty four; nor against a *Cardinal Bishop* without seventy two Witnesses, Lamb. 178. The general Rule is, *In ore dñum vel trium stet omne verbum si modo sint omni exceptione majores.* Two or three Witnesses be enough, if lyable to no Exception: Any

Any *one* Person may invent or contrive any Story for Malice or envy, or other End, to take away anothers Life, &c. And who can disprove or detect him? But it's not so easie for *two* to do it; yet *two* may possibly also agree and contrive an Evidence together, and so form it, and frame Circumstances all agreed of before-hand between them, that being false, it may yet seem very plausible; *The Children of this World be wiser than the Children of Light.* Jezebel had *two* Witnesses against *Naboth*; and two Witnesses were against Chaste *Susanna*, to prove her 'Avoutry, yet both had false Evidence against them. *Susanna* was acquitted, only because the Witnesses differed what Tree it was under. In all Tryals whatsoever in *England*, either at Civil Law, or Common Law, where is no *Jury*, there all will confess, must be

be *two* Witnesses at least, *Co. L. 6. b*.
And always that Witnesses are to be
joyned to the *Jury*, they must be
two at least, *ibid.* And in any Law
any where must be always *two* Wit-
nesses at least, and no place can be
pretended of otherwise, except *only*
England. And that it should be so
here, even when there is a *Jury* too,
see 48 *Aff. 5. Barree 241. Enquest.*
42. Bract. l. 5. 400. 48 E. 3. 30.
And so is expresly *Mir. c. 3. &c.*
Fortesc. 73. Co. L. 6. b Inst. 3. 26.
And so it was agreed in *B. C. Trin.*
9. El. And the only Reason why
it should be otherwise, is as afore-
said, that the *Jury* be presumed to
know themselves, to the value of
one Witness more. But if it so fall
out, that really they know nothing
themselves; then, should they find
one Guilty upon a single Testimony,
they make that Law, which other-
wise could not be Law, and find one
Guilty

Guilty the Law would have acquitted; and thus a Tryal by a *Jury* would be less safe, and more destructive than any other in all the whole World again. The *Jury* thus make *one* Witness as good as a *thousand*; for had a thousand Witnessed, the *Jury* could have done no more. This would occasion great Mischiefs, Perjuries, and other Inconveniences. *A.* then being sufficiently Malicious or Interested, and so designing *B's* Death; an *Italian* would *Poyson*, *Spaniard* *Stab*, *Frenchman* *Pistol* him; but being an *Englishman*, and expecting such a *Credulous*, *Officious Jury*, as *afore-said*, to help him, will sure chuse to *swear* him to Death; for *A.* has his Malice better answer'd. *B.* thus not only loses his Life, but also his Credit, Estate, and what not? Besides attainting his Blood, and utterly disgracing all his Relations; and

and at last, how shall *A.* be discovered in it? He is infinitely more safe this way than any other. Or suppose one comes out of the Moon, and by chance should discover him, he knows he is safe of his Life, he shall not dye by our Law: If any body happen too that will be at the Trouble, Charges, Hazard, and Danger to Prosecute him never so severely. But by the Statute he shall forfeit 40 *l.* or at his Election stand a while on the Pillory, and half a year be in Prison; this is all. Likewise a cunning Rogue, suppose Robs one, &c. no Witness by; if one offer to Prosecute him, let him Prosecute first, and he Hangs one *thus* into the bargain, and saves himself honourably. Or were there one or two Witnesses by, but he first Prosecutes, and Swears against all; it will go hard with them all.

It's

It's said of the *Egyptians* they had no punishment for lying, and so had no measure in it; But thus our Law tempts as well as scarce at all punishes Perjury. A Jury though have two or more Witnesses ought also consider and examine their circumstances. Amongst the *Turks* only such may be Witnesses as are Freemen, can say their prayers, have some knowledge in Law, be known of civil life and conversation, &c. *Boschiner Academ.* 19. By the Laws of *Scotland* (for the most part always like ours) none shall be Witness under 14 years old; furious people, officer of the same Court, Women, Adultrous persons, Thieves, poor, whipt for any offence, infamous, convict and ransomed from justice, kinsfolks, Companions or parties of the same crime, Clergie against Laity; nor any ones Tenant, Bailiff, servant or any other of his Robe,

Robe, Councel, Retinue, &c. nor any known adversary, nor any person Excommunicate or Imprisoned for, or accused of a Crime. *St. 2. Rob. 1.* By *our* Laws none ought to be a Witness that's Indicted of Treason or Felony and not acquitted, persons excommunicate, outlawed or otherwise defamed, nor Judges in any case where they shall be concerned as Judges, *Brit. 39. Mir. 117. 108. Bract. 118, 119, 133, 141.* Persons outlawed or otherwise infamous, *11 H. 7. 41. Young 116. Stanf. 88. 11 H. 4. 35. Inst. 3. 26.* And certainly they can't that be infamous as attainted of a false Verdict, of any Conspiracy at Kings suit, of Perjury, of a Præmunire, of Forgery on the *Stat. 5 El. c. 14.* of Felony, or have by judgment lost their ears or stood on the Pillory, or be Infidels, or *non sana memoria*, of insufficient discretion, considerably inter-

interested in the matter, *Crompt.* 127.^b
Co. L. 6.^b A Husband or Wife can't
 be Witness for or against one ano-
 ther, *Co. L. 6.*^b nor against any other
 in the same cause, *Stanf.* 26.^b
 Except in criminal cases where he
 or she is the party offended, and
 swears only for the King and no o-
 ther Evidence can be expected. The
 confession of a Criminal gotten by
 fright or any artifice used upon him,
 or made before comes to his Tryal
 is no Evidence against him. The
 Common Law was so strong in this
 point that 'till 2, 3, *P. & M. c.* 10.
 no Justice of Peace could examine a
 Criminal; in short,

*Conditio, sexus, etas, discretio, fama,
 Et fortuna, fides in testibus ipse
 requires.*

Ask his Estate, Fame and Religion,
 Quality, Sex, Age and Discretion.

But

But the *Judges* use to Determine *who* shall be sworn, and *what* shall be produced as *Evidence* to the Jury, and the *Jury* what *credit* or *authority* the same's worthy of, *Co. L. 6. b* One that's burnt in the hand for Felony is by some held to be a Witness in Law; for, the Crime say they, is purged so if pardoned by the King. And some hold many of those aforesaid are in Law good Witnesses, as *Poor* men; but the Jury may consider such may easier be byassed or corrupted, he has not so much to lose or forfeit for a Crime, he lies under several necessities and temptations a Rich man does not, &c. In *Solomons* (Proverbs) c. 30. praying against poverty the reasons alledged *lest being poor, one should steal and take the Name of the Lord in vain*. And its for something the Poet says,

Quantum

Quantum quisq; sua nummorum ser-
vatur in arca,

Tantum habet & Fidei—————
Juvenal.

As for *servants*, &c. they are under the same circumstances commonly of *Poor men* and worse, for more apt to do any thing in obedience, or favour, or else out of Malice, &c. against or for their Lord, &c. Before the Conquest the Oath of a *Thane* (one of like degree then as a Yeoman is now) was in Law Equivalent to the Oath of 6 *Villains*, *Pagans*, &c. (servants that were bound) *Lamb.* 56. 200. as for Persons any wise *Infamous*, such will not value or stand upon their Credit, or but the less, since have little or none to lose, and over shoes over boots. As for criminal Persons, It's a maxime, *Iustitia non potest cum scelerato commercium habere.* He that

that has been once wicked, or in one thing, may be suspected again, or in another thing, hence where a Defendant is supposed in Law guilty but of a contempt, Trespass, deceit or injury: He shall not wage his Law, for the Law will not believe *him*, though would believe another against *whom* is an action of Debt, Detinue or Account, Co. L. 295. As for one under 14 Years old, such are, as our Law says, not arrived at Discretion, such may mistake, be Influenced, &c. and so of all the rest. But it were not amiss if Juries heard all persons weighing their Testimony as ought. A Jury should mislike any Witness also that in's Evidence varies, delivers himself in any passion, speaks at random or not cautiously, or seems to side with or against either party, or to argue, or to offer proving Negatives. None can swear a Negative, nor
may

may be admitted to give Testimony directly against an Affirmative, 48 E. 3. 30. 12 H. 6. 6. *Affise* 408. 12 H. 4. 9. 50. E. 3. 16. 43. E. 3. 32. *Fleta* li. 6. c. 6. FNB. 136. h. 97. c.

A Jury may take notice of particular Statutes, Patents, Judgments, and other Records given in Evidence and may go against Estoppels, Conclusions, &c. so it be according to the very truth; for they must speak the truth, in all Cases, Co. 4. 53. It's much the Jury does not always examine Witnesses *themselves*. If he that examines them be corrupted or any wise ill affected, He may easily mislead the whole course of Evidence, He may countenance which side he will pleasedly, hearing the one side or one sort, but the other not without browbeating and uneasiness, He may frighten, discountenance, divert, puzzle, distract or otherwise abuse a Wit-

Witness, He may Flatter, wheedle, prompt, ask leading questions, direct, &c. and thus darken and perplex the truth.

How does a Jury discharge his Conscience thus? The Jury is the only Judges also of what is said, and how the Verdict shall be given, and they whose Consciences are to be satisfied, and certainly know best what they want to know, &c. unless walk by implicate faith, and therefore be the most proper to ask the Questions.

All that is aforesaid should also the rather be as proposed, considering how the Law is now alter'd as to Accusers, Judges, Witnesses, Councillors, Solicitors, &c. Anciently *Omnis qui crimen objicit scribat se probaturum. Et non oportet quenuquam Judicari vel damnari priusquam legitimos accusatores habeat presentes*, Ll. Guil. 1. c. 5. All Persons

sons that Indicted any other were to be sufficient, responsible, &c. Co. 5. 120. Accusers gave security to answer damages if the Accusation proved false. *Mir.* 19, 120, 124, 147, 195. *Glanv.* 75. *longam carceris inducunt inclusionem cum redemptione, falsæ appellationes & hujusmodi abettatores*, *Fleta* 142. Fines were set on Appellours, 11 R. 2. Fines 2. 15 E. 3. Fines 49. 107. If *A.* brought an Appeal in any Case and was either barred, nonsuited, or his Writ abated, He was fined and imprisoned *immediately without Defendants trouble*. 8 H. 4. 17. 20. *Brit.* 245. 32. *Ass.* 9. 42. E. 3. 26. Appellee acquitt, the Apellour was by the same judgment without more trouble imprison'd a Year and day, and was to repair the damages of Credit, trouble, charges, &c. of Appellee, besides, undergo a grievous Ransom or Fine to the King; and so was it of

of Abettors or encouragers of the prosecution, *Fleta* 53. It was death to Appeal innocent persons of any mortal Crime, till *H. 1.* brought it to Corporal punishment and satisfying the party-grieved his damages, *Mir.* 250, 251. So the Lawyers were punished for assisting the Accuser, and a year and a day's Imprisonment inflicted on a Sergeant, Lawyer, Attorney, or Clerk, to use Deceit or Collusion in a Court, or consent to it either in favour of the Court, or any Person else, *Fleta*, 87. Councillors were to be suspended Practise, if tendered false delays, false Witnesses knowingly, used Deceits, Fictions, or Untruths to the Court. And were to Swear not to maintain or defend any wrong or falsity, *Mir.* 121, 122. And it's by a kind construction they be not yet lyable in several Cases to be punished, as Barrettors, Maintainers,

English Juries. 121

ainers, &c. An Assize did lye against Councillors, Attorneys, &c. by whose ill practise or means any one lost but a Free-hold in Land, *Mir.* 154. 209. *Brit.* 315. So Witnesses have formerly been punished severely. In the Scripture, the Story of *Susanna*, the Witnesses are put to Death. By *Moses's* Law it was Eye for Eye, and Tooth for Tooth, Life for Life, &c. against false Witnesses, *Deut.* 19. 21. By the Law *Cornelia* amongst the *Romans*, a Witness that occasioned another's Death by false Testimony, lost his Head, if one of the greater Quality, else he was Hanged on the Cross, or given to Wild Beasts, *Similar.* Before the Conquest, that of *Moses* was mostly; so with us, only sometimes it was Banishment, &c. *11. Ed. c. 3. Ethelst. c. 10. 25. Edm. c. 6. 35. &c. Edw. & Gru. c. 11. Aussi sont homicides devolunt juges*

& *tesmonis que fausses*; *Mir.* 34.
 36. False Judges, and false Wit-
 nesses are guilty of wilfully killing
 Men. After it came to cutting out
 of Tongues, *Mir.* 8. 4. *El. Canut.*
c. 15. As for Judges, they were
 accounted Dissensours, if wronged
 any one in his Title, *Brit.* 137. *Mir.*
 154, 209. *Brit.* 315. In Scotland,
Judex qui ter male judicasse convictus
fuerit perdit Officium & fit infamis,
Stat. Rob. 1. *c.* 28. A Judge con-
 victed of thrice having ill Judged,
 loses his Office, and is adjudged in-
 famous. Says Glanvil, *Tenetur Cu-*
ria Judicium suum tueri per duellum
& maxime per illum qui Judicium
reddidit. Et quidem si Curia de
falso Judicio convicta fuerit, Dominus
Curiae in misericordia Regis manet &
perpetuo Curiam amittit; praeterea
tota Curia in misericordia Regis re-
manet, *Glanv.* 66. *Altrest qui faus*
jugement fuit pert sa Were si il ne
pret

English Juries. 123

pret prover for saintz que melz ne
poet juger, Lamb. 162, 64. Also
whosoever gives a false Judgment,
shall forfeit his *Were* (what's Life
is worth) unless can prove on Oath
he could Judge no better. Judges,
if Condemned one to Death against
their knowledge, or by Ignorance
of, or in what they ought not, as
Judges, be Ignorant of, they be
Murderers, &c. and to dye as such,
Mir. 256. v. Bract. 412. King
Alfred's Law was, That false Judges,
because dishonour God, whose Vi-
cars they be (the Scripture calls
them Gods) and the King, which
raises them to such an Honourable
Seat as the Chair of God; they
shall (first) make satisfaction to
the Party grieved, forfeit what else
they have, and suffer further Punish-
ment at Kings will and pleasure.
And if they falsely put to Death
any, then to dye themselves, and
G 2 always

always at least to suffer like for like, *Mir.* 265. 301. Appeal of one's Death lay against a Judge for Judging one falsely or wrongfully to Death, *Mir.* 136, 258, 298. Presentments were made against Chancellours, Judges, &c. for breaking their Oath, *Mir.* 144. There were 44 Judges hanged in one Year for wrongful Judgments, *Mir.* 296. &c. And says the same Book, it's an abuse, that all things are not so now, 296. What became of *Tresilian* and *Belknap*, of later years? But now the Law seems clear otherwise, we have little or no punishment against Chancellours, Judges, Counsellors, Attorneys, Clerks, Witnesses, &c. yet were Juries then so cautious, as aforesaid, with and against them, where now therefore how many times more Jealous and cautious have they reason, and should they be?

The

The Law considering the great burden that lies upon the Consciences of Jury-men, has favoured them with this Liberty. They may, as aforesaid, take upon them the knowledge of what the *Law* is in the matter, or upon the truth of the *Fact*, as well as the knowledge of the *Fact*, and so give in a Verdict generally *that the Defendant is Guilty or not*. Or they may give in *only* the matter of *Fact*, particularly how they find it to be, and then leave it to the Judges to determine. Or they may acquaint the Judges how the matter of *Fact* stands, and then ask the Judges their Opinion, as to the matter of *Law*, and then determine the whole matter *themselves*. The *Grand Jury* strikes out of the Indictment what they be not certain is true; or may any wise alter it to what they be certain is true: Or if any thing be

if it they be *doubtful of*, they may
 superscribe it *Ignoramus*, at their
 Election, in all these Cases. Thus
 if a Jury find the words not spoke, or
 the Fact not done, with, and accord-
 ing to the Aggravations & Circum-
 stances in an Indictment, &c. men-
 tioned: They ought either *not find*
 the Indictment (for one not being
 Guilty as the Indictment mentions,
 is consequently not Guilty of that In-
 dictment, but rather seems, if Guilty
 at all, Guilty of some other mat-
 ter than which he stands Indicted
 of, and so of some other Indictment
 only; and then let the Prosecutor, if
 so fond of troubling his Neighbours,
 bring such other:.) Or *strike out*
 what they have not sufficient Evi-
 dence of, as do often in Indictments
 of Murder (which say the Defen-
 dant, *of his malice fore-thought Fe-
 loniously Killed and Murdered* such a
 one.) *strike out the words of his ma-
 lice*

like fore-thought, and Murdered, having no Evidence of the Malice, but sufficient of the rest, and then Endorse it *Billa vera*, and so find the Bill, *Man-slaughter*, instead of *Murder*. So was it of an Indictment, against Lord *Chandois* and Count *Arundel* his Second in a Duel. In like manner when the Evidence proves a Fact done only by mischance, defending ones self, in time and place of War, when Defendant was *non Compos mentis*, an Officer doing his Office, &c. the *Grand Jury* alter the Indictment accordingly. So of the *Petit-Jury*, only it does not alter the Indictment, &c. but instead of altering Murder to Man-slaughter, &c. as aforesaid, in the Indictment, they only say, Guilty of Man-slaughter, and not of Murder; or Guilty of Chance-medley, *Se Defendendo*, &c. Or they may tell the Court particularly and

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plainly

plainly how they find the Truth in and of the whole matter to be so far as concerns the Fact, or what was done or said. As in Cases of words, what were spoke, where, to what intent, &c. and so leave it to the Court to Judge upon it according to Law, and to tell what the Law is thereupon, and so be discharged themselves, which is called giving a *Special Verdict*. Suppose *A.* bring an Action of Debt on a Bond against *B.* as Heir of *C.* and *B.* pleads he hath nothing from *C.* to pay any thing with; and *A.* replies, that he has, &c. and so the Issue is joyned (or what the *Jury* be to Try, is) whether *B.* has any thing, as afore-said, or not. *A.* proves that *B.* had before the Action, brought something so, but aliened it by fraud and ill Practise, to deceive *A.* of his Debt. Now, they finding the matter or case to be thus indeed, and the
Law

Law being (for there is a Statute, 13 E. 2.) that such aliening shall be void, and consequently, the Heir chargeable nevertheless: They may, if will, as aforesaid, either take upon them to know the *Law*, and in this, or any Case, say generally, they find for *A.* Or not take notice of the *Law*, but *only* of the *Matter*, and so tell the Court how, and what they find the matter to be; and thus leave it to the Court to Judge in *Law*, whether ought to be found for, and this is their most safe way. To this end was the *Stat. of West. 2. c. 3.* that if a *Jury* doubt on the Evidence what the *Law* is, and therefore what to do, they might leave it to the Judges to determine. But, says *Coke*, this Statute is only in *affirmance of the Common Law*, *Inst. 2. 425. 13 E. 1. 39.* See a *special Verdict* in Case of *Murder*, *Co. 4. 44. Co. 9. 63.* One

in an *Information*, *N.B. Entr.* 375, 378. *Co.* 1. 22. One in *Arrest*, *Dy.* 173. So in a Case about *Murder*, the *Jury* tell the Court, they find the Killing it self to be true, but not the Killing Feloniously, as mentioned in the Indictment, and so ask the Opinion of the Court if it be Murder, *Co.* 9. 69. So the *Jury* found the Parties Indicted for *Riotously* tearing the Petition, Guilty of tearing the Petition, but not of the *Riot*, &c. It's true, it's doubted in *Moor*, c. 1002. whether in a Writ of Right a *Jury* may give a special Verdict. But as there is no Reason, that if the Cause be indifferently plain, as to the Law, the *Jury* themselves should not put an end to it, giving a *General* Verdict, as Guilty, or not Guilty, &c. without so much further Charge, loss of Time, and increase of Trouble, as otherwise must needs follow; yet on the other hand,

hand, there is as little why, if there be difficulty in Law upon the Case, that they being mostly unlearned in Law, should be bound to find generally Guilty or not, &c. and so find and say on a sudden what is the very Law, as well as Fact, when some such Cases have several years puzzled all the Judges to Resolve. And it's against all Reason, that the *Election* of giving a special Verdict, or general Verdict should be in the Judges too for the *Jury* best knowing themselves, their own Capacities and strength, do therefore best know when meet with difficulties to them in Law, and so when to give the one or other: And accordingly are the best Opinions that the *Jury* may *chuse*, be the Action, &c. real, personal, or mixt, Civil, Criminal, Publique, or Private; and be the Issue general or special, or in any Case whatsoever:

And

And that the Judges must accept of,
and can't refuse such Verdict, 13 E. 1.
30. *Fitz. J. of P.* 114. *Co. 9.* 14.
Inst. 1. 425. *Inst.* 4. *Co. L.* 227.
228.

Either Jury may any time alter
their Opinion or Verdict, &c. be-
fore Recorded in Court, *Fitz. J. of*
P. 114. *Co. L.* 227.

All said any where above of *Grand*
Juries, may be applyed to the *other*
Juries; and no body will offer to de-
ny but *other Juries* ought to be as
strict, circumspect, and careful, &c.
as aforesaid, though would pretend
otherwise of *Grand Juries*.

A *Petty Jury* may abridge a fault
a *Grand Jury* finds one Guilty of, but
can't enlarge it: As one Indicted of
Murder, may by the *Petit Jury* be
found Guilty of *Man-slaughter*,
Chance-medley, &c. instead thereof;
but one being Indicted of *Man-*
slaughter, can't by the *Petit Jury* be
found

found Guilty of Murder, or any greater Crime than Man-slaughter.

A Petit Jury can't give any Verdict against any one, where Life or Member is in question or danger, but only in the Court, whilst also it's sitting, &c. though in other Cases may.

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A
LETTER
TO THE
Author.

S I R,

HAVING by your Friend received your Treatise concerning *Furies*, with desire that I should shew it to one whose course of Study is so well known to be Conversant with Ancient Records and Books, as his
Judg-

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Judgment is worthily Esteemed, I did, after I had Read it over, perform that Trust, by shewing it to that Learned Gentleman, whose Opinion, your Friend told me, was desired; and further, by that Gentleman, it was Communicated to another Worthy Person of the same Course of Study; and both of them having Read it over, I from them return it to you, with assurance, that they, as well as I, have had much Satisfaction and Delight by seeing so useful Subject Matter so Learnedly Treated of, in a time, when the Publishing it seems *not only Seasonable, but Necessary.*

I wish we might have the Happiness to know you, but being assured, by your Friend, that you have taken a Resolution, as yet, to Conceal your Name, we must for the present, think it enough to believe that Treatise is Composed by a *Worthy*, as we find it could be done
by

A Letter to the Author. 137.

by no other than a *Learned Man*.

And I must, in returning your *Manuscript*, present you some *Matters* and *Cases* which occurred to our Thoughts in Reading it; which being agreeable with yours on that Subject, yet some of those *Cases* and *Instances*, I am about to mention, not being so particularly Express'd in your Book, though two or three Passages which are in yours [as concerning all the Twelve of a *Jury* of Tryal to Consent in Verdict; and in *Grand Juries*, Twelve at the least to Consent in making Presentments, or Indictments; and the Matters of *Empson* and *Dudley*] I shall herein repeat, because they will relate to the other Paragraphs here intended; what may seem not mentioned in yours, are offer'd to you to consider, whether you will Insert them in some proper places among the Leaves and

and Parts of your Book, and reject the rest that I shall Write in these Papers, unless you please to receive them all together as they will be sent to you, by way of Letter, which yet must want the Ceremonial Form of Address, whilst you forbear to let me know to whom to direct my Respects.

What I am about to present to you, relating to this Matter, are;

Let any Sober Citizen consider, how Legal, Just, and Reasonable, he would think it, if being of clear Reputation; Credit, and Innocency, he should be Indicted for some Base, yet Capital Crime, upon the Oath of a *strange* or *bad Fellow's* Evidence, who should be altogether unknown to the *Grand Jury*, or vehemently suspected to be a *Rascal*, notwithstanding which they should (by the Judges Directions) find the Bill, and thereupon the Citizen should

should be publickly Arrested by Officers, haled from his House or Shop, Committed to Prison, his Goods Inventoried, and Gards set upon his House to prevent pretended Imbezelmments, and his Credit and Reputation utterly ruin'd, without Remedy. And after all this, that it should be said, the *Grand Jury* did well to find the Bill from whence all these sad and woful Consequences follow'd, *upon such late applauded Notions*, that the *Grand Jury* are not to be Judges of the Credibility of the Evidence; or that the Citizen is not in danger of his Life, till his Tryal by another Jury.

Again; How much would such Principles have been abhorred, and declaimed against, if a Woman, notorious for being a Common Whore, should have Indicted the late Archbishop of *Canterbury*, for a Rape, and the *Grand Jury* should have found

found the Bill, whereupon the Archbishop was to be Committed to Prison, Suspended from Ecclesiastical Jurisdiction, his Goods and Chattels all over *England* Inventoried by the Sheriffs? Would the Plea have Excused the *Grand Jury*, in the opinion of any Unbiaſſed and Impartial Man, that though they believed in their Conſcience, that the leud Woman Swore falſe, yet, they being to find according to her poſitive Evidence; they, as ſo many Pariſh Clerks were but to ſay *Amen* to her Oath of the Fact; and ſo find *Billa vera* againſt that Eminent Prelate?

It may be alſo conſidered, whether the Statute 13 *Car. 2. cap. 1.* which requires that perſons ſhall be Indicted and Accuſed by the Teſtimony and Depoſitions of *Two Lawful and Credible Witneſſes upon Oath can be Interpreted to make the*
Teſti-

A Letter to the Author. 141

Testimony of Two Witnesses not Credible, Sufficient Evidence? If the Witnesses are to be Credible, as the Statute plainly declares they ought to be; then it may be further ask'd, Who are to be Judges thereof? If the Judges? Then they take upon them to Determin *Matter of Fact*, and so become Judges both of Law and Fact; And what need then is there of *Grand Juries*? But that the Credibility of the Lives, as well as the Circumstances of the Evidence of the Witnesses is Intirely left to the *Grand Jury*, is plain from this; That if one of the Judges be produced as a Witness, he must in that respect, for that time, leave his place as a Judge, and be Sworn, and appear before the *Grand Jury*, as any other ordinary Witness.

Besides, If the intire Judgment of the Evidence had not by the Law been left to the *Jury*, then they
would

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would be finable, if they should refuse to find according to the direct Swearing of the Witnesses, (whether true or false, probable or improbable to them,) and if they should not implicitly follow the Pleasure and Direction of the Judges.

But that the Jury is not finable, is adjudged in the Case, you remember of Bushell, in the Lord Vaughan's Reports, by Solemn and Seasonable Resolution of the Judges.

And should not the Grand Jury be Judges of the Credibility of the Evidence before them, the *Affidavits* of Two Persons who should Swear Treasonable Words against any Man would be sufficient to bring him immediately upon the *Jury of Life and Death*, and then the trouble of a Grand Jury would seem only a piece of needless Formality, which our wise Ancestors
never

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never thought so slightly of before; and certainly the Use of them would never have been continued, nor would Men of so Great Worth, as they generally are, or should be, Serve therein; where Sheriffs make a Conscience of their Duty to Return such.

It may not seem Impertinent here, to mention a Memorial, or Credible Report, of what happened in the Reign of Queen *Elizabeth*, concerning a *Jury*, at a Tryal, whereof the substance is; That a Murder being committed, a Man, who was suspected for the Fact, was Arraigned before the Lord Chief Justice *Anderson*, at the Assizes; the Evidence was so strong that the Judge directed the *Jury* to find the Prisoner Guilty; and they going together to Consult of their Verdict, Eleven were for finding him Guilty, but the

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the twelfth Man was against it: This began great Dispute; and the Judge expecting a present Verdict, sent for them to know the Reason why they staid so long, he being ready to rise; the Jury told him, they were all agreed but one, whereupon the Judge askt him, why he did not agree with his fellows to find the Prisoner Guilty, seeing there was so plain and full Evidence? To this the twelfth Man gave no Answer (*where by the way may be noted, that none of the Jury are bound to declare their Reason for their Opinion.*) So the Jury was sent out again; but no perswasions could prevail with the twelfth Man to agree with the rest: Therefore the Jury were shut up all Night without Meat or Drink, and in the Morning great were the Complaints from the eleven, of the indisposition of their Health; so that the Judges

in

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in Commiseration sent for them, and they agreeing with the twelfth Man, the Prisoner was found Not Guilty, and so acquitted. After the Jury had given in their Verdict, the Chief Justice desired to speak with the twelfth Man, and that he should come to his Lodgings after the Court should rise: When he came, his Lordship taking him aside, told him, that the Countrey look'd on him as an Honest Man, but in what he had done, he much doubted there was something extraordinary, and desired him to tell him what it was: The Juror, with a disturbed Mind, told him, that if it might not turn to his prejudice, he would discover the whole business: To which the Chief Justice Replied, that it should not, and gave him his hand upon it; whereupon the Juror with tears told him that he was the Person that had un-

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fortu-

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fortunately killed the Man, and that the Prisoner was not Guilty of it; and that this Juror had not sought to serve in the Jury; and confessed, that after he was Sworn, *upon his Lordships Directions, and the Juries Importunities, he had once resolved to comply, and find the Prisoner Guilty;* but when he considered, that was to add Perjury, and another Murder unto Murder, he Resolved to be starved to Death, rather than to agree thereunto. When the Chief Justice had heard him out, you have, saith he, done a very ill thing; but seeing you have not added one crying sin to another, Pray God for Pardon, and I will get you the Queens Pardon.

Sir, you having mentioned in your Book, I might omit to say any thing, that Juries of Tryal every one of the twelve must agree, or no Verdict can be given,
and

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and no way should be introduced to go to the Vote, and Poll amongst themselves for the major part. But I could not forbear mentioning it again, because special notice should be taken thereof.

And also of what you have very well observed, that Grand Juries ought not to find any Bill, or make any Presentment or Indictment, unless twelve of their number agree to the Presentment or Indictment. The Rule of Law being very clear in this point, as may appear by the Statutes that direct Enquiry to be by the Oath of twelve Men: And all the said Statutes prove, and some of them expressly declare, that Enquiry by the Oath of twelve Men hath always been the laudable Custom and Usage of this Realm: Therefore though Grand Juries consist of a greater number, and may per matters that come before them

to the Vote and Poll, yet the major part of them ought to be twelve at the least to agree to any Bill of Presentment or Indictment; for there cannot Lawfully be any Presentment or Indictment, unless twelve of them consent thereunto, which I could not forbear the more expressly to repeat; *It being fit and necessary for all Gentlemen and others who serve in Grand Juries to know,* to prevent mistakes of what is so plainly the Law in all Cases of Presentment and Indictment by *Grand Juries.*

That *Juries* are Judges not only of Fact, but of Law, by your Treatise may more fully be seen, and may clearly appear by their Power to give Special Verdicts as well in Capital as Common Matters, as in Case of Indictment of Burglary, they may find only the Felony, and acquit of the Burglary, and many such

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such like Cases, as where Indictment for stealing Goods therein mentioned, of the Value of Ten Pounds, they may find the same to be but Ten Pence, and so to be but *Petit Larceny*.

And I hope it will not seem tedious to shew that *Juries*, as well of *Inquiry*, as *Trial*, have sometimes been Judges also in Matters of the Church and Religion, even in time of *Popery*.

As in Cases of *Præmunire*, such anciently was the Care and Watchfulness which our Law provided against the Danger and Incroaching Jurisdiction of the *Popes* and *Church of Rome*, which have always had Designs against *England*, our Laws and theirs being incompatible.

Therefore from the time of King *Edward the Third*, and the Reigns of the succeeding Kings, there have been Laws made, That if any of

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the Kings Subjects obtain Provision or Promotion to Benefices, or if any Appeal from the Kings Courts of Justice to the Court of Rome, &c, they shall be Imprisoned during Life, and Forfeit their Lands and Goods, and be out of the Kings Protection. And we know that the way of Inquiry and Tryal in these Cases hath always been by Juries.

*There are some other Matters Comprised within the Construction of the Statute of *Præmunire*, as the drawing Matters any where else to another Examination than in the Kings Courts of Law. And many other Offences made to be under the like Punishment, and call'd *Præmunire* by other Statutes, which we need not here mention; my intention being only hereby to shew that *Juries* have been anciently Judges of *Ecclesiastical Matters* even in time of *Popery*.*

And

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And for their having been Judges of Religion also, we may see, after King *Henry* the Eighth had Cast off the *Pope's* usurped Supremacy, and by the Power of a Parliament restored the Crown and Laws of *England* in Church Matters, to their ancient Rights and Usage, But had not then Cast off the *Popish Religion*; He, with the Lords Spiritual and Temporal, and the Commons in Parliament, in the Thirty first Year of his Reign, even at the Instigation of the Clergy (as is Recited in the Record of that Statute, and in *Rastal's* Printed Book of Statutes at Large, 31 *H. 8. c. 14.*) Enacted that the Statute (commonly call'd) of Six Articles; whereby,

1. The Real Presence in the Sacrament was to be believed.

2. That the Communion in both kinds was not necessary.

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3. That

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3. That Priests ought not to Marry.

4. That Vows of Single Life are to be kept.

5. That Private Masses were agreeable to God's Word.

6. That Auricular Confession was necessary, and that if any one should Publish, Declare, Say, Affirm, Argue or Hold any Opinion against the said Articles, he should suffer Pains of Death, without benefit of Clergy, and Forfeit all his Estate, Real and Personal, and Commissions were to be directed to the Bishops of the Diocess, their Chancellors, Commissaries, and other Persons, as the King should appoint, to *Inquire by the Oaths of Twelve Men concerning these Matters.*

Of which Statute, the Learned Dr. Burnet, in his *History of Reformation,*

formation, Folio 266. hath observed, "That there was but one Comfort which the poor Reformers could pick out of the whole Act, that they were not left to the Mercy of the Clergy in their Ecclesiastical Courts, but were to be Tryed by a Jury, where they might expect more Candid and Gentle Dealing.

But though these Matters were thereby to be brought before a Jury, yet so great were the Arts and Industry of the Bishops and those who were then most Zealous to uphold Popery, that they endeavour'd sometimes to bring back these things to their way of Determining without, and to lay aside Juries, and often when these Matters were brought before Juries, they did overawe them, and overstrained this Law, and so dreadful were the Storms, and so grievous

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the Persecutions against the then Dissenters, that in the 35th. Year of the same Kings Reign, to qualify the Severity (as by the Record thereof, and *Rastal's* Book of Printed Statutes at Large, 35 *H.* 8. cap. 5. may be seen) that whereas by force of the former Statute of 31 *H.* 8. Certain false Accusations and Presentments were brought against the Kings Subjects, and such Accusations and Presentments were kept secret from the knowledge of the Accused, till time espied, and they by Malice Convict, to the great Peril and Danger of the Subject. It was therefore Enacted, that Presentments and Indictments on the said Statute whereunto any person shall be call'd to answer, shall be in open Court, upon the Oaths of Twelve indifferent persons according to Equity and good Conscience, and as other Presentments have been used

to be taken in this Realm in such weighty Causes, according to the good and laudable Custom and Usage of the same. And that the Inquiry and Tryals upon the said Presentments and Indictments may justly and Charitably proceed without Corruption or Malice accordingly.

If any Object against this last recited Act, That the Statute of 31 H. 8. of the Six Articles, was afterwards, in the time of King Edward the Sixth, Repealed, and that this latter Statute of 35 H. 8. is also Repealed, or of none Effect; It is to be answered, That though the first be Repealed, and that the latter Statute, in what it relates to the former Statute in that respect be Repealed, or of no Use, yet as to what it doth Declare and Affirm to be the Ancient and long used Course of Law, that Juries should proceed

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proceed according to the *Laudable Custom and Usage of this Realm* and agreeable to good *Conscience and Equity*, and *Charity*, without *Malice or Corruption*, and that the *Lives of the Subjects* ought not to be drawn into danger by *False and Malicious Accusations*, and *Secret or Corrupt Practices*.

These are such *Fundamental Maxims and Rules of Law* as cannot be *Repealed*, and no *Judges* whatsoever may give any *Expositions* to the contrary, any more than they can do against *Magna Charta*, or any other *Fundamental Maxims or Rules of our Laws and Government*.

Thus you may see what was then declared by the greatest *Authority on Earth*, the *King, Lords and Commons in Parliament*, that the *Laudable Custom and Usage of this Realm*, hath ever been for
Grand

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Grand Juries to make their Presentments and Indictments according to good Conscience and Equity, and that they ought to proceed therein as well Charitably as Justly.

Since therefore in such matters as belong to Grand Juries to enquire, or are brought before them, they have as large Power as a Lord Chancellour hath in matters within his Cognisance. Well might Antiquity call them Grand Juries, as *Magna Charta* is called the Great Charter, from its great and weighty Contents.

Here I would not have it thought a Digression to add, that having seemed before to speak only of Grand Juries, and Juries of Tryal in Criminal Causes, that the like Rules are to be observed concerning Juries in Tryal of Actions between Party and Party, that the Judge should always leave the mat-
ter.

ter impartially and fairly before them, which would much diminish the number of trivial Actions, as of slander for words, &c. whereof there may be some doubt, whether some of them would bear an Action, if the Judge would be pleased at the Tryal not to countenance either Party, where a great Man sometimes will bring Action against a mean or poor Man for words it may be but slightly proved, though by Witnesses of seeming gravity, & not give directions thereupon, to give excessive Damages by reason of the great Quality of the Plaintiff.

I shall further take leave to observe, that both *Juries of Inquiry*, and *Juries of Tryal*, with their *Power and Priviledges*, are so naturally the Rights of *English-men*, that even when strong Endeavours were used to lay them aside by an Act of Parliament, which *Empson*
and

and Dudley (whom, though you mentioned in your Book, and I must take occasion to repeat with some Observation thereon) had procured in 11 H. 7. to proceed without Juries; yet when, like wicked Gardiners (for Gardiners may be a Simile for Councillors and Ministers of Justice and Government, and be styled good or bad as they behave themselves) the aforesaid *Empson* and *Dudley*, instead of using the Power they possess in their Masters favour, which should have been for preserving, had cut down some of those Ancient Trees of wholesome Fruit [the way of Enquiry and Tryal by Juries] and digged deep to bury them by the Act of Parliament they had obtained to that purpose, and hoped they would never rise again: Yet, *there being a lasting Life in our good old Laws*, (though sometimes as little to be discerned,

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as when the Life of Trees in Winter-time retires invisibly to their Roots;) The Act of 1177 was Repealed by an Act of Parliament, 1 H. 8. and the Use of Juries restored and sprang up again; to the Confusion and Destruction of those Treacherous Gardiners, of whom the History is Famous enough, to be a warning to all others to avoid the like mischief.

And how careful Judges have since been, and ought to be to maintain the Ancient and Rightful course of Law, and not to go out of it, may be seen in *Anderson's Reports*, fol. 156. where *Empson's* Indictment is recited at large. That Act of Parliament by which he and *Dudley*, being as in the 94 Psalm, ver. 20. like the seeking to establish mischief by a Law, and so contrary to the good Fundamental Law of England to Enquire and Try by Juries; that
though

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though it was an Act of Parliament they Acted by, it proved too weak to save their Heads; and became Fatal to them who procured, and were chief Instruments in the Execution of it; and the inferiour Instruments, the Informers and Promoters, were also severely Punished, and dyed shortly after, as mentioned by the History of King Henry the Eighth, Written by the Lord Herbert.

As an Appendix to the Treatise of Juries, might be also recommended to your Consideration, the late increase of Informations in the Crown-Office of Court of the Kings Bench in Criminal Cases, not specially and particularly exprest or directed by any Statute; for thereby the Subject is drawn into hazard of Liberty and Estate without Presentment or Indictment of Grand Jury, and thereby deprived of that great and
good

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Good out-guard of his Liberty and Property, the Inquest by Oath of twelve Men, before he should be brought to Tryal, which is worth the Judges Care to rectifie, or will be worthy the Consideration of a Parliament by a Law more fully to remedy for the future.

By having, after named *Empson* and *Dudley's* History, mentioned the Mischiefs, which if not carefully prevented, would grow by the Increase of the last mentioned Informations in the Kings Bench, I do not in either of these Cases intend any Reflection on any of the Judges; for as I am a Son of a Judge, who whilst he lived made it his Care to maintain, as well as use the Rules and due course of Law, and often, as well in publick as private Discourse, would praise the Excellency of our Laws, and particularly those of Enquiry and Tryal
by

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by *Juries* ; I bear such Honourable Respects and Kindness to the present Judges, as to believe and hope, that whatsoever (may sometimes happen) they always do, and will for the future, make it their Care to Preserve the Law in its due Course, and to Prevent any Mischief or Inconvenience from Entering or Growing in the Use or Practice of it.

I would here close, but that I could not totally forbear to take some Notice of the Ways which are used to Punish those *Protestants who do not Conform in the Outward Manner of Worship and Ceremonies, though they Agree with our English Church in the Main Doctrines thereof*, and in all respects behave themselves *Peaceably*, whereof I crave leave freely to say my mind.

That,

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That, though I Love our Church, and frequently and duely receive the Sacrament, and I and all my Family come constantly to Church every Sunday, (except hindred by Sickness, or other Extraordinary Impediment) and continue decently there during all the time of Divine Service; and I so well love the *Common Prayers* thereof, that I use part of them in my Family; and would persuade all I can to the like Conformity; yet I have that kindness to all those Protestants, commonly call'd *Dissenters*, who by reason of *Tenderness of Conscience*, *different Education*, or *Use of other manner of Worship*, and who, though they differ in Opinion, concerning some lesser Matters, yet hold the main *Doctrin of Christianity*, wherein all Protestants agree, notwithstanding their different manner of Worship.

And

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And I could use many Arguments for Gentleness towards them; whereof I shall here only name the Topicks of some of them; which are,

From the Common Sense of Humanity.

From Principles of Right Reason.

From Christian Charity.

From Divine Command, and the Holy Scriptures.

From its being well pleasing to God, and the Way to have his Blessing.

That the Beginning of Persecution of, and among Christians was from Antichristian Principles.

That Persecution is chiefly used by the Pope and Church of Rome.

That Union of Protestants is the Common Interest of the Protestant Religion both here and abroad.

That Union of Protestants is the best Way to Preserve and Defend

us

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us from the Idolatry, Policy and Force of Popery.

That the safety of Christendom depends upon it.

That it is the best way to preserve the English Monarchy, so as thereby it would Ballance, and Hinder the French King from gaining the Universal Monarchy, and be a Means to Preserve the Countries and Dominions of all other Princes of Europe in Safety.

That it would much increase the Peopling of this Land by quiet dwelling here.

That it would infinitely enrich this Nation by Increase of Trade, and Value of Land.

That Trade being thereby increas'd, His Majesties Customs will be also very much increas'd.

That Gentleness, Mercy and Kindness are honourable Qualities.

That

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That these Qualities are agreeable unto the Gracious Expressions of his Majesty to his Protestant Subjects concerning the same.

That it is sutable to the Kindness he shews to the Persecuted French Protestants.

That we hope some of his Counsellors and our Best Magistrates, are of the like Honourable Mind, concerning Gentleness to be used to Protestant Dissenters, and that the Measure of their Goodness will be esteem'd and taken by the Degrees of their Disposition to such Gentleness.

I could name more Particulars from whence much might be said on every of them to this purpose; which Task though it would be rather Pleasant than Difficult, I shall not meddle with, but leave it to some other

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other, who will better perform it than I can, it being unnecessary here to say more thereof, because it is here only proper to Observe how some late Acts of Parliament, relating to Church Matters, leaving the Trust of Punishing thereby, to the discretion of the Magistrates, without the use of *Juries* (which is so great a Trust, as was not usually left to any Judges in former Ages;) those who have that Power ought to be the more careful, discreetly and prudently to use it with Moderation, and not to abuse so great a Trust by overstraining such Laws, hunting after, and taking all Occasions they can to Punish their fellow Subjects with the utmost, or beyond the rigor, and contrary to the intention of those Laws.

And whereas one of the late Acts, allows an *Appeal*, it may yet
seem

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Seem hard for an Englishman to be put to that *after-game* of a hopeless Tryal of his Appeal by a Jury, when he is deprived of his *first Legal Gard*, a *Grand Jury*, to whom by the *Laudable and Ancient Usage of England*, all *Presentments and Indictments in Criminal Matters* do belong. And it is further to be considered, that the Person who is brought into this Trouble, may be under great Difficulties, whether to desire, or how to manage his Appeal, when, perhaps, *all his Goods*, by selling whereof he might provide Money to Deposit, as the Law requires, before he can be admitted to Appeal, are taken from him by *Distress*, and at last his Appeal shall be Tried before the same *Justices* that Inflicted the Penalty on him, and also that the Prosecution at the Tryal

I shall

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shall be managed by the Informers, who are to be sharers of the Profit they can get by the Poor Mans Ruine.

These are some of the Considerations I could not omit to mention, together with my wish, that the good Reputation of our Ancient Laws may not be clouded by any more such new Laws, as herein seem to imitate Ecclesiastical Courts, where proceedings are without Juries, which it seems some of our Clergy in times past did think to bring to pass, whereof, though I could mention some Instances, I shall only cite one fully to our purpose, out of the Lord Cokes 2d. Part of *Institutes*, being his Exposition on some Statutes, fol. 599. &c. where he saith, *It will conduce much to the understanding of this matter, to report unto you what Articles Arch-Bishop Bancroft exhibited in the*
Name

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Name of the Clergy, in Michaelmas Term, 3 Jacobi, to the Lords of the Council, against the Judges of the Realm, Entituled, Certain Articles of Abuses, which are desired to be Reformed in granting Prohibitions. And the Answers thereunto, upon mature Deliberation and Consideration, in Easter Term following by all the Judges and Barons of the Exchequer, with one unanimous consent under their Hands. Resolutions which were by them delivered to the Lords of the Council, and for distinction sake, because there might be occasion often to cite them, called Articuli Cleri, 3 Jacobi.

These Articles, and their Answers being very long, I must refer to be there read, as being very material to be known, how the Clergy endeavoured to get the multitude of Busineses into their Courts

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to be determined without Juries, and so encroach upon, and alter the Course therein of our good *English* Laws and Government. At the end of those Articles and Answers, the same Author further saith,

That the Clergy claimed to Interpret all Statute-Laws concerning the Clergy; but it was Resolved by all the Judges of England, That the Interpretation of Statutes concerning the Clergy, being parcel of the Laws of the Realm, belong to the Judges of the Common Law. And saith, Magna est veritas & prævalet. To which, as agreeing to the truth thereof, I may add, Lex Angliæ optima est, & prævalebit.

I would not have any of our present Clergy think I Reflect on them, for I truly and heartily Honour some of our Bishops and Dignified Clergy, and any others of them, whose soundness of Doctrine, great Learn-

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Learning, and good and Sober Lives are, and might be Examples for all the rest, and for whose sake I bear Civil Respect to the rest that are not altogether so praise-worthy as those good and most Reverend Men, to whom I bear my chief Respects, but shall say no more of any of them here, but that I hope they will leave off severe Punishing their fellow-Christians, *and forbear one another, Col. 3. 13. And study to be quiet, and meddle with their own business, 1 Thes. 4. 11.* And that by a re-view of these Laws, these things will in due time receive prudent and gentle as well as sufficient Cure and Remedy in Parliament.

And now, Sir, I hope you will Pardon me, for having, perhaps, been too tedious, seeing your Excellent Treatise contains so much on the behalf of Juries, that all that I can say, may seem needless; and

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you may think fit to lay aside what I have written; yet if it only have the effect to dispose you to let us know to whom we owe our Acknowledgments for your so good Book, which is fit for every *English-man*, who may think himself concerned in our Rights, to read and understand, I shall think it enough to testify that amongst those you will infinitely Oblige thereby; I shall desire to be

Your Friend and

Dec. 29.

Servant, J. M.

1681.

I Shall here add a necessary Post-script concerning 3. *H. 7. Cap. 1.* wherein there is a Clause, how in some special Case, a Jury of Enquiry may be fined, *That it only concerns such Matters and Offences whereof Indictments may be brought before Justices of the Peace in their County Sessions; if the Matter be plain and fully proved, and they wilfully conceal the same, the said Justices of the Peace might cause*

a new

a new Inquest to be returned (but the words, *take Inquest*, do not give the Justices power to name who shall be returned, *which is the Sheriffs office*) and it is to be only and purposely to enquire of such Concealment; and doth not extend to enquire of any other Offences whatsoever; and then after such wilful Concealment is found by such Inquest, *The same Justices of the Peate, in their County-Sessions, might Fine the Jury of the former Inquest.* By which may be Observed, *That the said Clause of the said Act of 3 H. 7. doth fully and clearly prove, That by the Common-Law, Juries were not Finable concerning their Presentments, Indictments, and Verdicts.* And even that Clause, since that time, being One hundred Ninety and four Years, or thereabouts, hath seldom or never been used. Our Books of Reports of Law-Cases not affording any plain or full Instance of any proceeding on that Clause of that Statute. Therefore it may seem, as Littleton saith in his Book, Section 108. *That in as much as it was never seen or heard that any Action was brought on the Statute of Merton (which was made 20 H. 3.) For the matter he treats of in that*

Section, no Action could be brought thereon. For if any Action might have been brought for that matter, it shall be intended, that it would some time or other have been put in ure. And with this agrees the Lord Coke, in his Comment on that place. And also the Judges, in their Arguments on a late Case of Action brought on the Statute about the Return of Members of Parliament, did Cite the said place of *Littleton*. By which appears concerning such unusual manner of Fining Juries by the Clause of 3 H. 7. how there ought to be great Caution in Executing any Acts or Statutes where they alter the Common-Law and Course thereof; seeing that Act of 3 H. 7. in that particular, and other memorable things therein, made then such alterations of the Common-Law of this Realm, as I forbear any further here to mention.

FINIS.

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
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